(25,402)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 572.

W. A. MARIN, AS RECEIVER OF THE AMERICAN BISCUIT COMPANY OF CROOKSTON, PLAINTIFF IN ERROR,

vs.

OLE J. AUGEDAHL.

IN ERROR TO THE DISTRICT COURT OF CASS COUNTY, STATE OF NORTH DAKOTA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 21, 1916.

* * * * * * *

1–60 *Agreed Record.*

In the Supreme Court of the United States.

W. A. MARIN, as Receiver of The American Biscuit Company of Crookston, an Insolvent Corporation, Plaintiff in Error,

vs.

OLE J. AUGEDAHL, Defendant in Error.

The action was commenced in the District Court of Cass County, North Dakota, by the service of a Summons and Complaint. The cause of action was restated in the following

Amended Complaint.

For his amended complaint herein the plaintiff alleges and respectfully shows to the Court:

I.

That the District Court of the 14th Judicial District of the State of Minnesota, which said District includes the County of Polk, State of Minnesota, is and at all times hereinafter mentioned was a Court of General Jurisdiction, both at law and in equity, and fully authorized and empowered by the constitution and laws of the State of Minnesota to entertain and hear all of the matters and proceedings hereinafter set forth and to make and render all of the rulings, orders, judgments, and decrees hereinafter referred to as
61 having been made, rendered and given by it.

II.

That at the time of the creation and organization of the American Biscuit Company, it was and still is the law of the State of Minnesota, that each stockholder of any corporation organized for the purposes specified in the Articles of Incorporation of the said American Biscuit Company, as hereinafter set forth, is personally liable to the creditors of such corporation to the amount of the stock held or owned by him, which said law is and at all times was part and parcel of the corporate charter of said corporation.

III.

That at all times mentioned herein, it was, and still is, the law of the State of Minnesota, that upon complaint of a judgment creditor made after the return unsatisfied of an execution issued upon such judgment, the District Court of any Judicial District in said State, may sequestrate the property of such corporation and

appoint a receiver of the same, and cause the property and effects to be disposed of under its direction.

IV.

That it, at all times hereinafter mentioned was and still is the law of the State of Minnesota, that whenever it shall be made
62 to appear by the petition of a Receiver that any personal liability of stockholders exists, and that it is necessary to resort to the same, the Court shall appoint a time for hearing, and order such notice thereof as he deems proper, but that proceedings had at such hearing shall be binding and conclusive upon each stockholder whether he shall have notice or not.

V.

That at such hearing such District Court shall receive and consider the evidence that may be presented upon the extent of the indebtedness, the amount of available assets, the liability of stockholders and the nature and extent thereof, and is authorized and empowered to order an assessment upon all parties liable as stockholders for such amount as shall be deemed proper, and to direct payment of the amount so assessed against each share of such stock to the Receiver, and is empowered to authorize and direct the Receiver to collect the amount so assessed and to prosecute actions to recover the same against all stockholders whether residents or nonresidents of the State of Minnesota and wherever found, it is the duty of such Receiver under such order and the law of said State, to commence action against every party so assessed, and it is the law of said State that such order is conclusive as to all matters relating to the existence of any liability and to the amount, propriety.
63 and necessity of the assessment against all parties adjudged liable upon or on account of any stock or shares of such corporation whether they shall have notice or not.

VI.

That the said American Biscuit Company of Crookston is a corporation duly organized under the General Laws of the State of Minnesota, with its principal place of business at Crookston, Minnesota. That the said corporation was organized on or about the 18th day of February, 1905, with a capital stock of Fifty thousand Dollars ($50,000.00) divided into five hundred shares of a par value of One hundred dollars ($100.00) each, and that by its Articles of Incorporation it was empowered to manufacture and sell biscuits, crackers, candies, confections, cereals, and other kindred products, or supplies (necessary) or component parts thereof, and the machinery, fixtures, equipment and supplies necessary for the manufacturing and dealing in the same; to sell, buy, own, hold, lease and convey such real estate and personal property as may in the judgment of its directors be necessary, proper and profitable in carrying on its business; to appoint and remove agencies for the con-

ducting of any branches thereof, and to maintain and operate stores and depots for the sale and disposal of its products and the purchase of its supplies, and in general to do and perform all matters
64 and things necessary and proper in the successful conducting of its said business, which said business the said corporation continued to carry on after its organization.

VII.

That on the 17th day of May, 1907, the said American Biscuit Company of Crookston was duly adjudicated a bankrupt by the District Court of the United States for the District of Minnesota, Sixth Division, and all of its property, both real and personal, was sequestered and sold under the said bankruptcy proceedings in the said Court, and that the proceeds realized thereby was used to pay the preferred claims and secured indebtedness owing by the said American Biscuit Company, and there was no property or assets remaining thereafter to the said American Biscuit Company, and that the said American Biscuit Company thereafter discontinued business and since such time has not attempted to perform any business whatsoever.

VIII.

That the said American Biscuit Company after the administration of its affairs in bankruptcy was largely indebted to various creditors in the sum of Fourteen thousand four hundred and eleven and 88/100 Dollars ($14,411.88), which indebtedness is still owing and unpaid, and that it had no assets or property whatever and was wholly insolvent and bankrupt. That one of the creditors
65 of the American Biscuit Company of Crookston was the Villaume Box & Lumber Company, and that on or about the 11th day of September, 1909, an action was duly commenced in the District Court of the County of Polk and State of Minnesota wherein the said Villaume Box & Lumber Company was plaintiff and the said American Biscuit Company of Crookston was defendant, to recover the amount due upon an account for merchandise sold and delivered to the said American Biscuit Company at its special instance and request, and caused a Summons to be served upon said defendant by the Sheriff of Polk County on that day and thereafter such proceedings were duly had in said action; that upon the 20th day of September, 1909, a judgment was fully entered in favor of said Villaume Box & Lumber Company against the American Biscuit Company of Crookston for the sum of Nine hundred and nine and 7/100 Dollars ($909.07), damages and costs; that thereafter an execution was duly issued upon said judgment to the Sheriff of Polk County, Minnesota, and was in due time returned and filed with said Court, in the office of the Clerk thereof entirely unsatisfied, and that said judgment still remains wholly unpaid and unsatisfied.

IX.

That on the 14th day of February, 1910, an action was duly commenced in the District Court of the county of Polk and State of

Minnesota, wherein the said Villaume Box & Lumber Com-
66 pany was plaintiff and the said American Biscuit Company of Crookston and all the persons and parties who had subscribed to the stock of the said American Biscuit Company were defendants. That said action was commenced by said Villaume Box & Lumber Company and other creditors of said American Biscuit Company for the enforcement of the superadded or stockholders' liability of the stockholders of said American Biscuit Company of Crookston for the debts of said company and for the appointment of a Receiver of the property and assets of said American Biscuit Company and to enforce the said liability of the stockholders of the said insolvent corporation, and that thereafter such proceedings were duly had in said action, that on the 13th day of May, 1912, an order was made by the Court in said action ordering and adjudging that the said American Biscuit Company was insolvent, and appointing the plaintiff herein Receiver, with full power and authority to collect and bring and maintain actions at law or equity to enforce payment of the statutory liability of the stockholders of said insolvent corporation.

X.

That this plaintiff duly qualified as such Receiver and is now the Receiver of the said American Biscuit Company by and pursuant to the order of the Court in said action hereinbefore set forth.

XI.

67 That thereafter and on or about the 21st day of August, 1912, this plaintiff duly petitioned the Judge of the District Court of the Fourteenth Judicial District, County of Polk and State of Minnesota, for a rehearing for a ratable assessment of all stockholders of said American Biscuit Company, and that due Notice of the hearing on said petition was duly given as required by Law and under the orders of said Court, and that on the 25th day of September, 1912, a hearing was duly had on said petition and by reason of said hearing and the evidence adduced thereat the said Court by its order dated the 25th day of September, 1912, made an order in said proceedings ordering and assessing against each and every share of the capital stock of said American Biscuit Company of Crookston the sum of One hundred Dollars ($100.00) and against the persons and parties liable as such stockholders of said American Biscuit Company of Crookston, and further ordering that each and every party or person liable as such stockholders pay to this plaintiff as Receiver of said insolvent corporation the sum of One hundred Dollars ($100) for each and every share of stock on which he should be liable, within thirty days after the date of said order, and that said Receiver forthwith proceed to collect the several amounts due from the several persons or parties liable as stockholders of said American Biscuit Company, and that in case any person or party liable as stockholder of said corporation shall fail to pay the
68 amount thereof assessed against the share or shares of stock held or owned by said stockholder, or upon or on account of

which he may be liable, then the said Receiver is hereby authorized and directed forthwith to institute and procure such action or actions or other proceedings against such person or persons, party or parties liable, in any Court having jurisdiction, whether in the State of Minnesota or elsewhere, which said Receiver may deem necessary or proper for the recovery of the amount due from such person or persons under the terms of said Order.

XII.

That the defendant herein is the owner of one share of stock of the said American Biscuit Company of Crookston of the par value of One hundred Dollars ($100.00), and that the said stock was issued to the said defendant upon the 21 day of June, 1905, and said defendant herein was a stockholder of the said American Biscuit Company during the existence of the indebtedness hereinbefore set forth, and was a stockholder at the time of the action to enforce the liabilities of stockholders herein was commenced, and that the amount of the liability of the said defendant, by reason thereof and of the facts aforesaid, is the sum of One hundred Dollars ($100), and that defendant has not paid the same.

Wherefore, Plaintiff demands judgment against the defendant for the sum of One hundred Dollars ($100.00) with interest
69 thereon from the 25th day of September, 1912, at the rate of six per cent per annum, and for the costs and disbursements of this action.

W. J. MAYER,
Attorney for Plaintiff.

Demurrer.

Defendant appeared in the action and demurred to the Amended Complaint as follows:

Comes now the defendant in the above entitled action and demurs to plaintiff's amended complaint herein for the reason and upon the ground that said amended complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant.

Dated August 6th, 1913.

STAMBAUGH & FOWLER,
Attorneys for Defendant, Fargo, N. D.

Order Sustaining Demurrer.

The issue arising on the demurrer was heard by the District Court, which made the following order:

It appearing to the Court that the demurrer to the complaint in the above entitled action was made, served and filed, and that pursuant to notice of trial duly served by the plaintiff, the issue of law

raised by said demurrer was duly brought on for hearing
70 and heard by this Court on the 22nd day of July, 1914, and that after hearing the arguments upon said demurrer the Court filed its decision herein holding that the said demurrer should be sustained and directing in said decision that an order should be prepared, signed and filed containing said demurrer and the Court having been advised that the said plaintiff elects to stand on his said complaint and does not wish to amend said complaint.

Now, therefore, It is ordered that the said demurrer be and the same is sustained and that judgment be entered in favor of said defendant dismissing said case with prejudice and that costs in favor of said defendant be taxed and allowed by the Clerk of this Court.

Let judgment be entered accordingly.

Dated August 19, 1914.

CHAS. A. POLLOCK, *Judge.*

Judgment.

Judgment was entered in the District Court in due form dismissing the action on the merits and for the taxable costs and disbursements.

Appeal.

Plaintiffs thereupon perfected an appeal in due form from the foregoing judgment of the District Court to the Supreme Court of the State of North Dakota, and upon the hearing of said ap-
71 peal by the Supreme Court of the State of North Dakota that Court rendered the following decision:

The receiver of a defunct Minnesota corporation brings action against a North Dakota stockholder for a superadded liability under the Minnesota laws. No personal service was had upon defendant. A demurrer to the complaint was sustained.

(1.) The complaint shows that the defunct corporation was organized for manufacturing purposes and the stockholders of such corporation were, therefore, not liable for superadded liability. For the reasons stated in the opinion the demurrer was properly sustained.

(Syllabus by the Court.)

Appeal from the District Court of Cass County. Pollock, J.

Affirmed.

Opinion of the court by Burke, J.

W. J. Mayer, of Grand Forks, North Dakota, and A. A. Miller, of Crookston, Minnesota, Attorneys for Plaintiff and Appellant.

A. W. Fowler and L. L. Twitchell, of Fargo, N. D., Attorneys for Defendant and Respondent.

MARIN
v.
AUGEDAHL.

BURKE, *J.*:

Appeal from judgment of the trial court sustaining a demurrer to plaintiff's complaint and dismissing the action with prej-
72 udice. The amended complaint is very long and states in substance that defendant is a stockholder of a defunct Minnesota corporation; that said corporation was in the hands of a receiver appointed by the District Court of the Fourteenth Judicial District of the State of Minnesota; that a judgment remained unsatisfied against the said corporation and that said District Court in Minnesota had deemed it necessary to levy an assessment against the stockholders. Those allegations are not set out in full, as we do not deem them necessary to a decision of the controversy presented. Paragraph 6 of the complaint alleges that the said defunct corporation was organized on or about the 18th of February, 1905, "with a capital stock of $50,000, divided into 500 shares of a par value of $100 each, and that by its Articles of Incorporation it was empowered to manufacture and sell biscuits, crackers, candies, confections, cereals and other kindred products," etc. Paragraph 2 of the complaint reads as follows: "That at the time of the creation and organization of the American Biscuit Company it was and still is the law of the State of Minnesota that each stockholder of any corporation organized for the purposes specified in the Articles of Incorporation of the said American Biscuit Company, as hereinafter set forth, is personally liable to the creditors of such corporation to the amount of the stock held or owned by him, which said law, is, and at all times was, part and parcel of the corporate charter of the said corporation." Plaintiff was the receiver of the said
73 American Biscuit Company, insolvent. To this amended complaint a demurrer was interposed upon the grounds that said complaint does not state facts sufficient to constitute a cause of action. The Minnesota statutes upon which plaintiff relies for his recovery are Sections 3184-7, inclusive, Revised Laws of Minnesota, 1905, and Section 3 of Article 10 of the Minnesota Constitution the latter reading as follows: "Each stockholder in any corporation, excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business, shall be liable to the amount of stock held or owned by him."

There is little dispute as to the law in this case and no dispute as to the facts. Appellant insists that the complaint shows a judgment of the District Court of Minnesota to the effect that the American Biscuit Company is insolvent; that it owes debts over and above its assets; that there is a judgment unsatisfied and outstanding, and that in the judgment of the trial court an assessment upon the stockholders is necessary. These findings of said Minnesota court are claimed to be unassailable in the present action. Respondent concedes that if the Minnesota District Court had jurisdiction, appellant is right upon his construction of the law, but insists that the

complaint itself discloses affirmatively that said Minnesota court did not have jurisdiction. This is the only controversy.

74 (1.) We have already set forth extracts from the amended complaint which show that this company was organized for the purpose of manufacturing biscuits, etc. Under the holdings of the Supreme Court of Minnesota, the stockholders of such corporations were exempt from superadded liability.

Senour v. Church, 81 Minn. 294, 84 N. W. 109;
Cuyler v. City Power Co., 74 Minn. 22, 76 N. W. 948;
Hastings Malting Co. v. Iron Range Brewing Co., 65 Minn. 28, 67 N. W. 652;
Vencedor Investment Co. v. Highland Power Co., 125 Minn. 20, 145 N. W. 611.

In the Senour case they say: "In proceedings to inforce the personal liability of stockholders for the debts of the corporation, the Articles of association are the sole criterion as to the purposes for which the corporation was formed." In the said case their articles read: "The general nature of the business of this corporation shall be to manufacture painters' materials and supplies, and the owning, holding, and using of letters patent pertaining to the manufacture of such articles, and the selling of such manufactured articles, and the doing of anything that is properly incident to or necessarily connected with such manufacturing business." In the Cuyler case the articles read: "The general nature of its business shall be the acquiring and holding, either by purchase or lease, of real estate and water power, and the purchasing, hiring, building, improving or construction of canals, locks, ponds or water courses * * * for the purpose of producing and creating water, steam and other motive power," etc.

75 In all of these cases the corporations were held to be manufacturing and the stockholders exempt. It is thus apparent that plaintiff has pleaded facts showing conclusively that the Minnesota District Court was without jurisdiction to make this assessment. Paragraph 2, which we have already quoted, to the effect that under the laws of Minnesota each stockholder of any corporation organized for the purposes specified in the Articles of Incorporation of the said American Biscuit Company, as hereinafter set forth, is personally liable to the creditors, is a mere conclusion of law. Plaintiff might as well have pleaded that the defendant owed plaintiff $100 and let it go at that. The facts disclose that the Minnesota Court did not have jurisdiction.

The fact that the said court thought it actually had jurisdiction is not conclusive. Having no jurisdiction of the subject matter and not having personal service upon Augedahl, the assessment falls. The demurrer was properly sustained. Affirmed.

EDWARD T. BURKE.
C. J. FISK.
E. B. GOSS.
A. A. BRUCE.
A. M. CHRISTIANSON.

76 Thereupon the record was remanded to the District Court with directions that the judgment appealed from be affirmed and that the respondent recover from the plaintiff taxable costs.

Judgment was thereupon entered in the District Court in due form in favor of Ole J. Augedahl against the plaintiff for the taxable costs on said appeal.

Petition for and Allowance of Writ of Error.

The plaintiff in said cause thereupon presented to Hon. C. J. Fisk, Chief Justice of the Supreme Court of the State of North Dakota a petition in the usual form for the allowance of a writ or error for the review of said judgment by the Supreme Court of the United States. The petition was granted and an order made directing issuance of the Writ of Error. The petition for writ of error was accompanied by a bond in the usual form with a penalty of five hundred dollars, which bond and the sureties thereon were duly approved by the Chief Justice of the Supreme Court of the State of North Dakota.

Assignments of Error.

The following assignments of error accompanied and were presented and filed with the petition for writ of error:

Now comes the Plaintiff in error in the above entitled cause and avers and shows that in the records and proceedings in said cause the Supreme Court of the State of North Dakota erred to the
77 grievous injury and wrong of *of* the plaintiff herein and to the prejudice and against the rights of the plaintiff in error in the following particulars, to-wit:

1. The said Supreme Court erred in holding that the order and judgment of the District Court of the State of Minnesota determining that the defendant in error as a stockholder of The American Biscuit Company of Crookston was duly liable to an assessment of One hundred per cent of the stock of said American Biscuit Company owned by him, is not binding on said defendant, and your petitioner alleges that in so holding said Supreme Court did not give full faith and credit to the judicial proceedings of the State of Minnesota, as is required by the Constitution of the United States.

2. That said Supreme Court erred in holding that the aforesaid action of the District Court of Minnesota in holding that the defendant in error was liable to the superadded or statutory liability as a stockholder in The American Biscuit Company of Crookston was not conclusive as to the liability of said defendant, and your petitioner alleges that in so holding the said Supreme Court did not give full faith and credit to the judicial proceedings of the State of Minnesota as is required by the Constitution of the United States.

3. The said Supreme Court erred in holding that the District Court of Minnesota did not acquire jurisdiction to deter-
78 mine the liability of the defendant in error to the superadded or statutory liability, as a stockholder of said The American

Biscuit Company of Crookston, and your petitioner alleges that said Supreme Court thereby did not give full faith and credit to the judicial proceedings of the State of Minnesota in respect to said matter as is required by the Constitution of the United States.

4. That said Supreme Court erred in not reversing the judgment of the trial court, and in not giving to plaintiff in error his rights under the Constitution of the United States as claimed and set forth in the record in said cause.

Wherefore, For these and other manifest errors appearing in the record, the said William A. Marin, as Receiver of The American Biscuit Company of Crookston, an insolvent corporation, plaintiff in error, prays that the decision of the said Supreme Court of the State of North Dakota be reversed and the judgment pursuant to its order be set aside and held for naught, and that judgment be rendered for the plaintiff in error, granting him his rights under the Constitution of the United States.

And plaintiff in error also prays judgment for his costs.

WILLIAM A. MARIN,
As Receiver of The American Biscuit Company of Crookston, Crookston, Minnesota.

79 EDWARD ENGERUD,
Fargo, North Dakota, and
A. A. MILLER,
Crookston, Minnesota,
Attorneys for Plaintiff in Error.

Citation and Writ of Error.

A Writ of Error in due form was duly issued and Citation in due form was likewise issued and served upon counsel for defendant in error, whereupon the record in said cause was transmitted in due form, duly certified, to the Clerk of the Supreme Court of the United States.

Stipulation.

It is hereby stipulated and agreed that the foregoing agreed record is a full and correct transcript of all material parts of the record, and it is agreed that the same may be printed as the record in said cause.

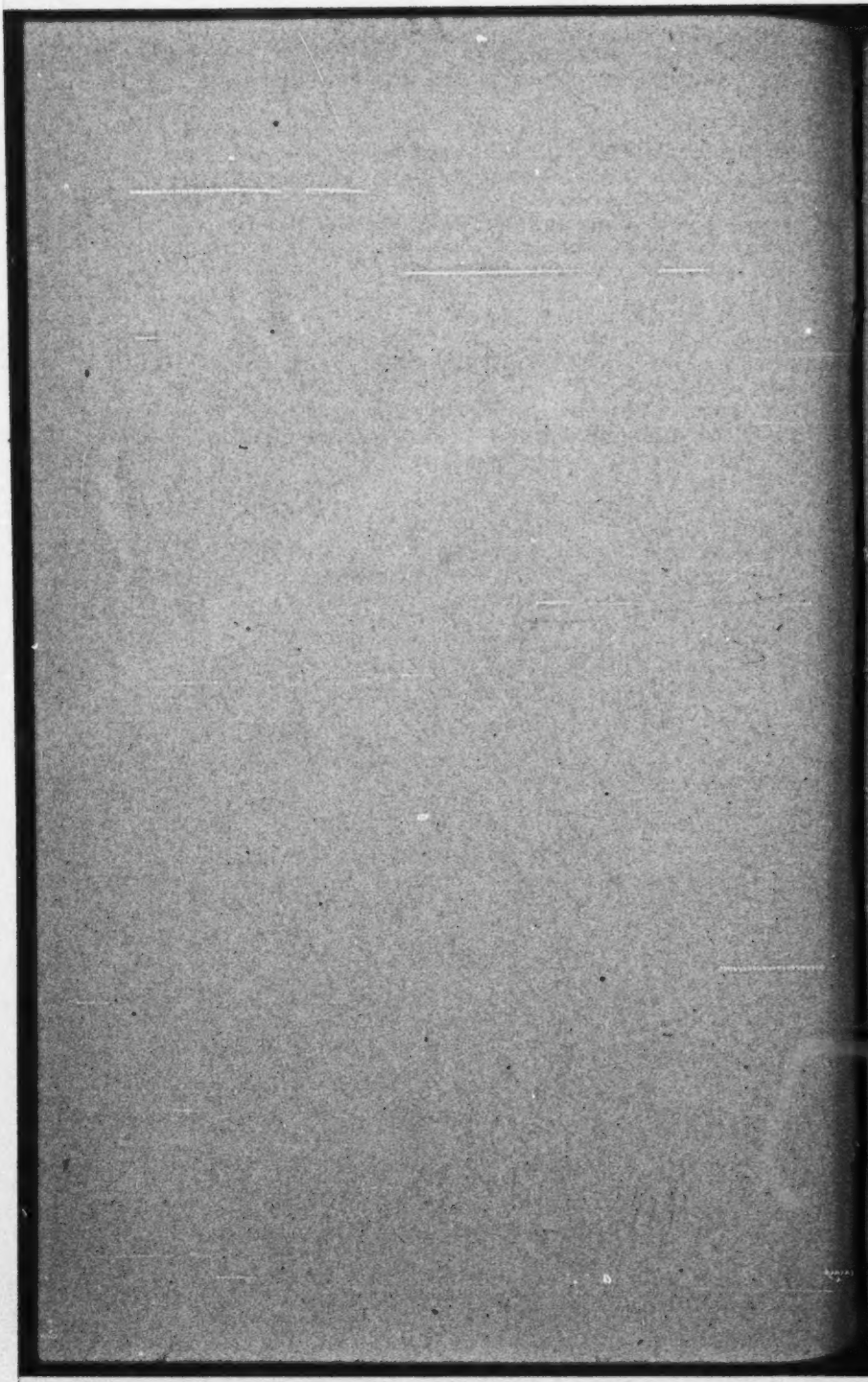
EDWARD ENGERUD AND
A. A. MILLER,
Attorneys for Plaintiff in Error.
L. L. TWICHELL AND
A. W. FOWLER,
EMERSON H. SMITH, *Of Counsel,*
Attorneys for Defendant in Error.

80 & 81 [Endorsed:] Original. In the Supreme Court of the United States. W. A. Marin, as Receiver of The Amer-

ican Biscuit Company of Crookston, an insolvent corporation, Plaintiff in Error, vs. Ole J. Augedahl, Defendant in Error. Stipulated Record. A. A. Miller, Crookston, Minn., Attorney for Plaintiff in Error; A. W. Fowler, Fargo, N. D., Attorney for Defendant in Error. 15554. Filed in the office of Clerk of District Court, Cass County, N. D., — o'clock M., Jun- 6, 1916. E. C. Gearey, Jr., Clerk. By R. F. Croal, Deputy.

* * * * * * *

Endorsed on cover: File No. 25,402. North Dakota District Court of Cass County. Term No. 572. W. A. Marin, as receiver of The American Biscuit Company of Crookston, plaintiff in error, vs. Ole J. Augedahl. Filed July 14, 1916. File No. 25,402.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 227

W. A. MARIN, as Receiver of The American Biscuit Company of Crookston, *Plaintiff in Error,*

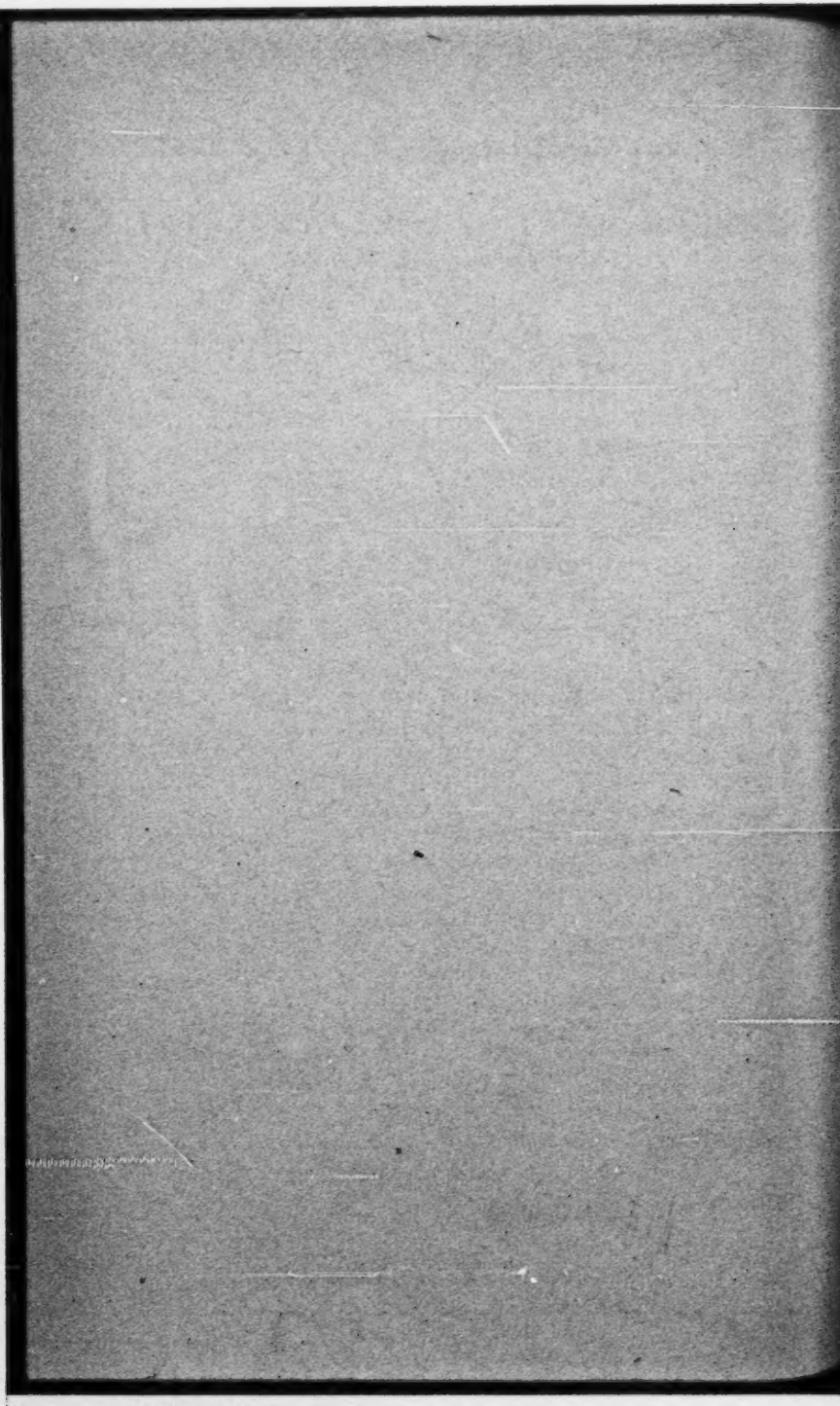
vs.

OLE J. AUGEDAHL, *Defendant in Error.*

IN ERROR TO THE DISTRICT COURT OF CASS COUNTY, STATE OF NORTH DAKOTA.

BRIEF FOR PLAINTIFF IN ERROR.

A. A. MILLER,
Crookston, Minn.,
AND
EDWARD ENGERUD,
Fargo, N. D.,
Attorneys for Plaintiff in Error.



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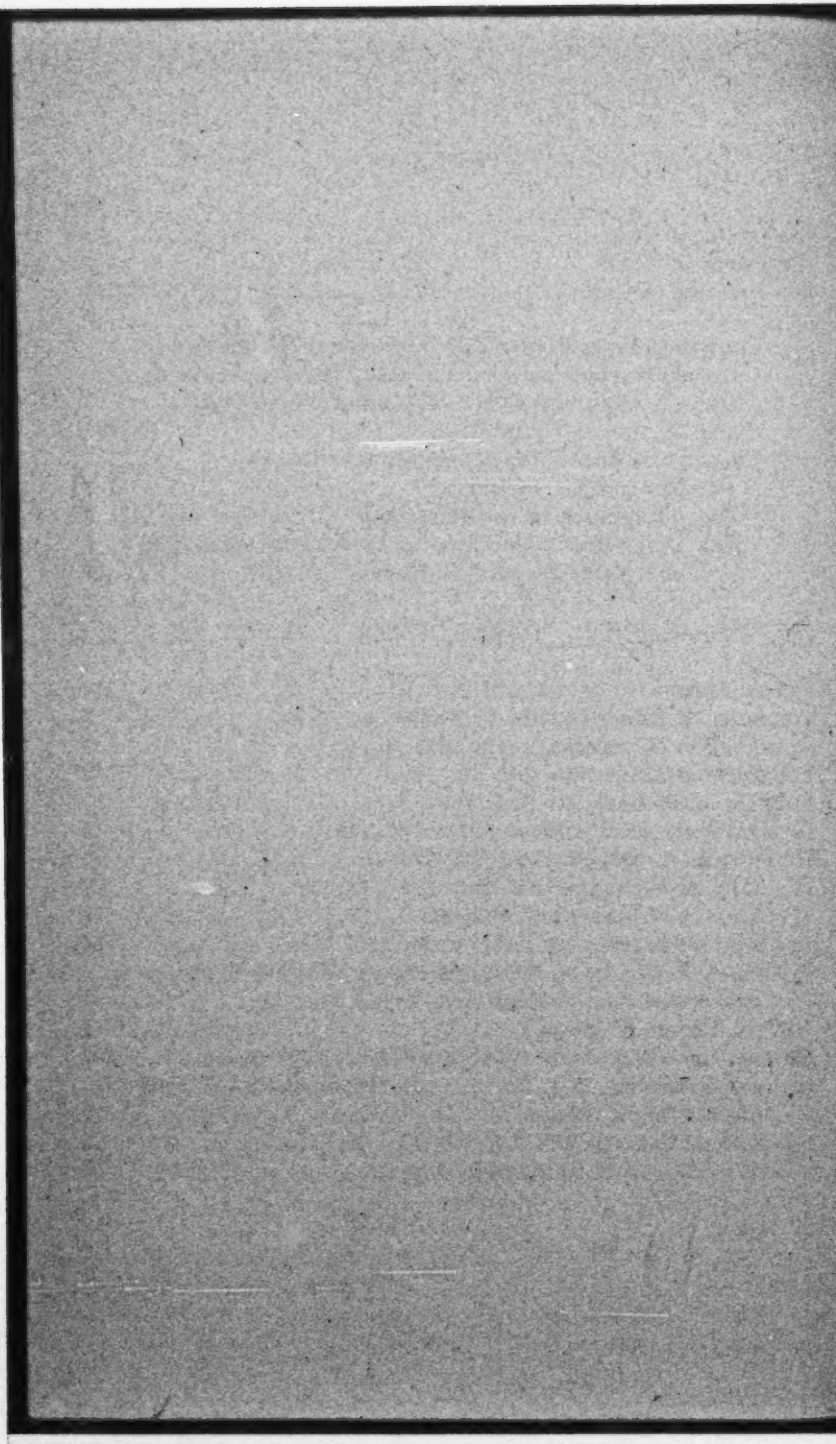
CASES CITED.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 572

W. A. MARIN, as Receiver of The American Biscuit Company of Crookston, *Plaintiff in Error,*

vs.

OLE J. AUGEDAHL, *Defendant in Error.*

IN ERROR TO THE DISTRICT COURT OF CASS COUNTY, STATE OF NORTH DAKOTA.

STATEMENT OF THE CASE.

The plaintiff in error brought this case in the District Court of Cass county, in the state of North Dakota, to recover the double, or statutory liability imposed by the constitution and statutes of the state of Minnesota upon the defendant in error as one of the stockholders of the American Biscuit Company of Crookston, a bankrupt corporation of the state of Minnesota, by the service of a summons and complaint upon said defendant who was a resident of the state of North Dakota. A general demurrer to an amended complaint in the action was served, and on trial of the case was sustained by said District Court and judgment of dismissal on the merits entered in said court. From this judgment an appeal was taken by plaintiff to the Supreme Court of North Dakota. By that court the judgment of the district court was affirmed and the case remanded with directions that the judgment be affirmed and that that defendant recover taxable costs. Such a judgment was entered in the District Court.

This action was brought by plaintiff pursuant to an order of the District Court of Minnesota in and for the county of Polk, appointing him receiver of the American Biscuit Company of Crookston for the purpose of collecting the double liability of its stockholdeds which said court had assessed on all its stockholders including this defendant. The North Dakota court refusing to give effect to the determination of the Minnesota court that the stockholders of this particular corporation were subject to the double liability, imposed by the laws of Minnesota. This liability was the only question discussed in the Supreme Court of North Dakota or decided therein.

The plaintiff in error claims that the decision of the Minnesota court is final on that question, and that it must be given full force and effect in every court of the United States, and that the refusal of the North Dakota Supreme Court so to do was a violation of the rights of plaintiff guaranteed by the constitution and laws of the United States.

STATEMENT OF FACTS.

The appellant is the receiver of the American Biscuit Company of Crookston, duly appointed by the District Court of Minnesota in and for the county of Polk in the Fourteenth Judicial District (folio 66). The American Biscuit Company of Crookston is a corporation organized under the laws of Minnesota with its principal place of business at Crookston, in Polk county, in said state. It was incorporated in February, 1905, with a capital stock of $50,000, divided into shares of the par value of $100 each. It began business and continued until May 17th, 1907, when it was adjudicated a bankrupt by the District Court of the United States for the District of Minnesota, Sixth Division. It was empowered by its Articles of Incorporation to manufacture and sell biscuits, crackers, candies, confections, cereals and other kindred products, or component parts thereof, and the machinery, fixtures, equipment and supplies necessary for the manufacturing and dealing in the same; to sell, buy, own, hold, lease, and convey such real estate and personal property as may in the judgment of the directors be necessary, proper and profitable in carrying on its business; to appoint and remove agencies for the conducting of any branches thereof, and to maintain and operate stores and depots for the sale and disposal of its products and the purchase

of its supplies and in general to do and perform all matter and things necessary and proper in the succesful conducting of its business. (folio 63, 64).

At the close of the bankruptcy proceedings there remained an indebtedness to sundry creditors in excess of $14,000, with no property from which to pay any part thereof. Amongst such creditors was Villaume Box & Lumber Company which brought suit in the District Court of Polk county, Minnesota, on September 4th, 1909, against said American Biscuit Company of Crookston by the service of a summnos upon it. Such proceedings were had in said action that on September 28th, 1909, judgment was entered in favor of said plaintiff against said defendant for the sum of $909.07 damages and costs, which judgment is wholly unpaid (folio 64, 65). Thereafter an execution was duly issued on said judgment to the sheriff of said Polk county, which in due time, was returned and filed in the office of the clerk of said District Court wholly unsatisfied and remains wholly unpaid (folio 64, 65).

On February 14th, 1910, an action was duly begun in the District Court of Polk county by said Villaume Box and Lumber Company against said American Biscuit Company of Crookston in which all its stockholders were named as defendants, for the purpose of enforcing payment of the superadded or stockholders liability for the debts of said corporation (folio 65, 66).

On May 18th 1912, in said action an order was made and entered by the court appointing the plaintiff in this action receiver of said American Biscuit Company of Crookston with full power to collect said statutory liability of the stockholders of said corporation (folio 51). Pursuant to said order, on August 21st, 1912, this plaintiff duly petitioned the judge of said District Court of Polk county, Minnesota, for a hearing for a ratable assessment on all the stockholders of said corporation. Notice of hearing of said petition was served on all the stockholders as required by the order of the court and the laws of Minnesota (folio 52). On September 25th, 1912, a hearing was had on said petition and an assessment was duly ordered by the court of one hundred dollars on each share of the capital stock of said American Biscuit Company of Crookston, and against each of the stockholders thereof, and directing payment thereof to be made to the receiver within thirty days after the date of such order, and directing this plaintiff as

such receiver to enforce payment of such assessments by suits against such stockholders as should fail to make such payment either within or without the state of Minnesota (folio 66, 67). The defendant herein was and is the owner of one share of the capital stock of said American Biscuit Company, which was issued to him July 20th, 1905, (folio 68).

ASSIGNMENTS OF ERROR.

Now comes the plaintiff in error in the above entitled cause and avers and shows that in the records and proceedings in said cause the Supreme Court of the state of North Dakota erred to the grievous injury and wrong of the plaintiff herein and to the prejudice and against the rights of the plaintiff in error in the following particulars, to-wit:

I.

The said Supreme Court erred in holding that the order and judgment of the District Court of the state of Minnesota determining that the defendant in error as a stockholder of the American Biscuit Company of Crookston was duly liable to an assessment of one hundred per cent of the stock of said American Biscuit Company owned by him, is not binding on said defendant, and your petitioner alleges that in so holding said Supreme Court did not give full faith and credit to the judicial proceedings of the state of Minnesota, as is required by the Constitution of the United States.

II.

That said Supreme Court erred in holding that the aforesaid action of the District Court of Minnesota in holding that the defendant in error was liable to the superadded or statutory liability as a stockholder in the American Biscuit Company of Crookston was not conclusive as to the liability of said defendant, and your petitioner alleges that in so holding the said Supreme Court did not give full faith and credit to the judicial proceedings of the state of Minnesota as is required by the Constitution of the United States.

III.

That the said Supreme Court erred in holding that the Dis-

trict Court of Minnesota did not acquire jurisdiction to determine the liability of the defendant in error to the superadded or statutory liability, as a stockholder of said American Biscuit Company of Crookston, and your petitioner alleges that said Supreme Court thereby did not give full faith and credit to the judicial proceedings of the state of Minnesota in respect to said matter, as is reqired by the Constitution of the United States.

IV.

That said Supreme Court erred in not reversing the judgment of the trial court, and in not giving to plaintiff in error his rights under the Constitution of the United States, as claimed and set forth in the Record in said cause.

ARGUMENT.

The first two Assignment of Error call in question the action of the Supreme Court of North Dakota wherein it held that the determination of the District Court of Minnesota that the stockholders of the American Biscuit Company of Crookston were liable to the double liability imposed by the constitution and laws of Minnesota was not binding and conclusive on all of said stockholders.

The third assignment challenges the correctness of the holdings of the North Dakota Court that the District Court of Minnesota never acquired jurisdiction to determine the liability of the defendant in error to the superadded or statutory liability as a stockholder of The American Biscuit Company of Crookston, and all of the assignments allege that by its action said North Dakota Supreme Court refused to give full faith and credit to the judicial proceedings of the state of Minnesota in said matter as required by the Constitution of the United States.

I.

IS THE ACTION OF THE DISTRICT COURT OF POLK COUNTY, MINNESOTA, ASSESSING ALL THE STOCKHOLDERS OF THE AMERICAN BISCUIT COMPANY OF CROOKTON, INCLUDING THE DEFENDANT IN ERROR, IN THE PROCEEDINGS IN THAT COURT FOR THE ENFORCEMENT OF STOCKHOLDERS' LIABILITY BINDING ON SAID DEFENDANT IN ERROR, AND IF SO IS IT CON-

CLUSIVE, NEITHER THE SUMMONS, NOR THE PETITION OF THE RECEIVER FOR AN ASSESSMENT HAVING BEEN PERSONALLY SERVED ON SAID DEFENDANT WITHIN THE STATE OF MINNESOTA, HE BEING A RESIDENT OF THE STATE OF NORTH DAKOTA?

The provisions of the Minnesota Statute in respect to the enforcing of stockholders' liability are found in Sections 3184 to 3187, inclusive, Revised Laws Minnesota 1905, the same being contained in Chapter 272, General Laws of Minnesota 1899, and are as follows:

"3184. ENFORCEMENT OF STOCKHOLDERS' LIABILITY.—Whenever it shall be made to appear by the petition of a receiver or assignee of a corporation or of any creditor thereof whose claim has been filed, that any constitutional, statutory, or other liability of stockholders or directors or both exists, and that it is necessary to resort to the same, the court shall appoint a time for hearing, not less than thirty nor more than sixty days thereafter, and order such notice thereof as it deems proper, by publication or otherwise to be given. When the receiver is not the petitioner, personal notice shall be given to him.

3185. HEARING UPON PETITION.—Upon such hearing, after proof of due service of notice, the court shall receive and consider such evidence by affidavit or otherwise as may be presented by the receiver, or by any creditor, officer or stockholder, appearing in person or by attorney, upon the following points:

1. The nature and probable extent of the indebtedness of the corporation;

2. The probable expense of the receivership;

3. The probable amount of available assets;

4. The parties liable as stockholders, the nature and extent of the liability of each, and their probable solvency or responsibility.

If it appears that the available assets, or such amount as may be realized therefrom within a reasonable time, will be insufficient to pay such expenses and indebtedness in full and without delay, the court shall order a ratable assessment upon all parties liable as stockholders, or upon account of any stock of such corporation, for such amount, proportion, or percentage of such liability upon or on account of each share of such stock as it shall deem proper considering the probable solvency and responsibility of the stockholders and the probable expense of collecting

such assessment, and shall direct payment of the amount so assessed against each share of such stock to the assignee or receiver, within the time specified in such order.

3186. CONTENTS OF ORDER—CONCLUSIVENESS.—Such order shall authorize and direct the assignee or receiver to collect the amount so assessed, and, on failure of any one liable to such assessment to pay the same within the time prescribed, to prosecute an action against him, whether resident or non-resident, and wherever found. Such order shall be conclusive as to all matters relating to the amount, propriety, and necessity of the assessment, against all parties therein adjudged liable upon, or on account of, any stock or shares of such corporation, whether appearing or being represented at the hearing or not, or having notice thereof or not.

3187. ACTION FOR ASSESSMENTS, HOW AND WHERE PROSECUTED.—Upon expiration of the time specified in the order for the payment of assessments, the assignee or receiver shall commence action against every party so assessed and failing to pay, wherever he or any property subject to process, in such action is found, unless he shall report to the court that he believes such stockholder to be insolvent, or that the expenses of the prosecution will probably exceed the amount likely to be collected, in which case the court, unless satisfied to the contrary, shall order action suspended as to such party."

(a) That the statute is constitutional has been held both by the Supreme Court of Minnesota and on appeal by the Supreme Court of the United States.

Straw & Ellsworth Mfg. Co. vs. L. D. Kilbourn Boot & Shoe Co., 80 Min. 125.
London & Northwestern American Mortgage Co. vs. St. Paul Improvement Co., 84 Minn. 144.
Bernheimer vs. Converse, 206 U. S. 516.
Converse vs. Hamilton, 224 U. S. 243.

In London & Northwestern American Mortgage Co. vs. St. Paul Park Improvement Co. supra, quoted and approved by this court in Bernheimer vs. Converse, the Minnesota Court says:

"The first and important question is whether the act under which the assessment was made (Laws 1899, c. 272) is constitutional. We held it was in the case of Straw & Ellsworth Mfg. Co. vs. L. D. Kilbourn Boot & Shoe Co. 80 Minn. 125, 83 N. W. 30. But in view of the great importance of the question we permitted it to be fully re-

argued in this case. We have given the able argument and exhaustive brief submitted on behalf of the appellants the consideration the importance of the question demands. We are not, however, convinced that the former decision was wrong. We adhere to it and hold the act constitutional.

(b) The order of the Minnesota court determining the propriety of, and necessity for the assessment, and fixing the amount thereof at one hundred dollars on each and every share is conclusive on all the stockholders resident or non-resident, and is not to be questioned in any other court.

Sec. 3186, Revised Laws Minnesota 1905, ('99 c. 272 ss. 4, 5).

Straw & Ellsworth Mfg. Co. vs. L. D. Kilbourn Boot & Shoe Co., supra.

Spargo vs. Converse, 112 C. C. A. 337.
Neff vs. Lamm, 99 Minn. 115.
Swing vs. Humbird, 94 Minn. 1.

In Swing vs. Humbird supra, the court says:

"The question of the conclusiveness of an assessment upon stockholders and members of a corporation for the payment of its liabilities made by a court having jurisdiction to wind up its affairs, is too well settled in this state to justify any extended discussion of it. Where a court has such jurisdiction of a corporation, its order or decree making an assessment upon its stockholders or members without personal notice to them, is conclusive as to all matters relating to the necessity for making the assessment and the amount thereof."

In Spargo vs. Converse supra, the court says:

"The judgment of the Minnesota Court can not be disregarded. It is conclusive as to the insolvency of the corporation, and that the assessment of 64 per cent was necessary to enable it to pay its debts. The stockholders, whether holding individually or in a representative capacity, were liable for the amount so assessed. The law of Minnesota (Rev. Laws 1905, sec. 3186) provides that:

'Such an order shall be conclusive as to all matters relating to the amount, propriety, and necessity of the assessment, against all parties therein adjudged liable upon, or on account of any stock or shares of such corporation, whether appearing or being represented at the hearing or not, or having notice thereof or not.'"

II.

DID THE DISTRICT COURT OF POLK COUNTY, MINNESOTA, ACQUIRE JURISDICTION TO ORDER ANY ASSESSMENT AGAINST ANY STOCKHOLDER OF THE AMERICAN BISCUIT COMPANY OF CROOKSTON?

(a) The court had jurisdiction of the subject matter.

"The District Courts shall have original jurisdiction in all civil cases, both in law and equity, where the amount in controversy exceeds one hundred dollars. * * * * *"

Constitution of Minnesota, Art. 6, sec. 5.

"And in all special proceedings not exclusively cognizable by some other court or tribunal, and in all other cases wherein such jurisdiction is especially conferred upon them by law. * * * * *"

Gen. Statutes Minnesota 1913, sec. 143.

Revised Laws Minnesota, 1905, secs. 3184 to 3187, supra.

(b) The Court had jurisdiction of the persons of the stockholders including the defendant in error.

The Minnesota Court acquired jurisdiction of the insolvent corporation, The American Biscuit Company of Crookston, by service of the summons upon it in the action in which the assessment was levied by the court. This jurisdiction gave jurisdiction of each individual stockholder whether he resided in Minnesota or elsewhere, and notice to the corporation is notice to all the stockholders whether they were actually served or not.

Spargo vs. Converse, supra.
Howarth vs. Lombard, 175 Mass. 570.
Straw & Ellsworth Mfg. Co. vs. Kilbourn, supra.
Bernheimer vs. Converse, supra.
Hawkins vs. Glenn, 131 U. S. 319.
Howarth vs. Ellwanger, 36 Fed. Rep. 54.

In Spargo vs. Converse, supra, the court says:

"The proceeding in Minnesota was against a corporation which represented its stockholders, and the receiver complied with the order and followed the direction of the court. Notice was sent to all persons whose names and addresses were known to the receiver. The judgment of the Minnesota Court cannot be disregarded."

In Howarth vs. Lombard, supra, the court says:

"The members of such corporations as well as the corporations themselves, are within the jurisdiction of the local court, so far as is necessary for the determination of the rights and liabilities of the corporation and its members among themselves. In reference to this kind of liability such decisions and orders are binding on stockholders who are not before the court otherwise than by virtue of their membership in the corporation."

In Hawkins vs. Glenn, supra, the court says:

"Sued after such an order of the court, the defendant does not deny the existence of any one of the facts upon which the order was made, but contends that there has been no call as to him, because he was not a party to the cause between creditor and corporation. We understand the rule to be otherwise, and that the stockholder is bound by a decree of a court of equity against the corporation in enforcement of a corporate duty, although not a party as an individual, but only through representation by the company.

A stockholder is so far an integral part of the corporation that, in view of the law, he is privy to the proceedings touching the body of which he is a member. Sanger vs. Upton, 91 U. S. 56, 58, in which case it is also said: 'It was not necessary that the stockholders should be before the court when it (the order) was made, any more than that they should have been there when the decree of bankruptcy was pronounced. That decree gave the jurisdiction and authority to make the order. The plaintiff in error could not, in this action, question the validity of the decree; and for the same reasons she could not draw into question the validity of the order. She could not be heard to question either, except by a separate and direct proceeding had for that purpose.' As against creditors there is no difference between unpaid stock 'and any other assets which may form a part of the property and effects of the corporation.' Morgan County vs. Allen, 103 U. S. 498, 500; and 'the stockholder has no right to withhold the funds of the company upon the ground that he was not individually a party to the proceedings in which the property was obtained.' Glenn v. Williams, 60 Md. 93, 116."

In Bernheimer vs. Converse, supra, the court says:

"Nor can we see any substantial difference in this respect between a liability to be ascertained for the benefit of creditors upon a stock subscription and the liability for

the same purpose which is entailed by becoming a member of a corporation through the purchase of stock whereby a contract is implied in favor of creditors, and while it is true that one promise is directly to the corporation and the other does not belong to the corporation, but is for the benefit of its creditors, either liability may be enforced through a receiver acting for the benefit of creditors, under the orders of a court in winding up the corporation in case of its insolvency."

(c) It was contended, in the lower court on part of defendant in error, that it appeared on the face of the complaint that the Minnesota court did not have jurisdiction to order any assessment against the stockholders of the American Biscuit Company of Crookston in that it conclusively appeared that said corporation was a purely manufacturing corporation and therefore within the exception of the rule making stockholders subject to the double liability.

The answer to this claim is apparent. The first question confronting the Minnesota Court on the hearing the petition of the receiver for an assessment was whether this was a corporation whose stockholders were liable to the double liability. If not liable, the petition should have been denied. Having held in favor of the liability and levied the assessment the decision is final in the absence of an appeal to the Supreme Court. In this case the receiver claimed the liability existed. Some court had jurisdiction to decide the claim. It might have decided wrongly. If so, the right of review by the Supreme Court existed. Not having availed themselves of that right in the proper tribunal, they are concluded in every other court.

Revised Laws of Minnesota 1905, sec. 3184 to 3186.
Hawkins vs. Glenn, supra, citing
Hableton vs. Glenn, 13 Va. L. J. 242;
Fauntleroy vs. Lum, 210 U. S. 230.

An order of assessment involves a determination that the corporation is of a class whose stock is assessable under the constitution.

Neff vs. Lamm, 99 Minn. 115.

In the opinion in the foregoing case the court says:

"Such proceedings are direct and complete. This is a secondary proceeding based upon a previous action in which the character of the corporation and the assessibili-

ty of its stock have been judicially determined."

Again in the same case the court says:

> "At the hearing in the original proceedings against the corporation which are contemplated by the act providing for 'The better enforcement of the liability of stockholders of corporations' (Laws 1899, p. 315, c. 272.), the court is required to consider proofs entirely 'as to what parties are or may be liable as stockholders of said corporation and the nature and extent of such liability' and whether the assessment made at such hearing is necessary. The order and assessment by that court are necessarily based upon a determination that the corporation is of the class whose stock is assessable, and not of the exepted class mentioned in section 3, Art. 10, Const. Minn."

Whether the North Dakota Court was justified in refusing to follow the decision of the Minnesota Court and in deciding for itself the question of the assessability of the stock in question is the vital point in the case. It is conceded that if it was bound by the determination of the Minnesota Court that its decision was wrong.

If the Minnesota Court had jurisdiction to hear and determine that question, its decision is final and can not be questioned elsewhere without violating the provisions of the constitution requiring the courts of every state to give full faith and credit to the judicial proceedings of every other state.

That a federal question is involved herein is too plain to require any citation of authorities.

The amount directly involved in this appeal is small, $100, but on the decision of this case depends the liability of some seventy-five or one hundred other stockholders in North Dakota.

It is respectfully submitted that the decision of the Supreme Court of North Dakota should be reversed and the judgment entered by its direction be vacated.

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AND
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Fargo, N. D.,
Attorneys for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1918.

No. 572.

W. A. MARIN, AS RECEIVER OF THE AMERICAN BISCUIT COMPANY OF CROOKSTON, PLAINTIFF IN ERROR,

vs.

OLE J. AUGERDAHL, DEFENDANT IN ERROR

In Error To The District Court of Cass County, State of North Dakota

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INDEX

CASES AND STATUTES CITED

STATEMENT OF THE CASE.

The plaintiff in error commenced this suit against the defendant in error in the District Court of Cass County, North Dakota, to recover against said defendant in error, who is a stockholder of The American Biscuit Company of Crookston, Minnesota, and who has at all times been a resident of North Dakota, upon an alleged superadded or double liability which plaintiff in error contends is imposed upon defendant in error by the Constitution and laws of Minnesota.

A demurrer was interposed to the complaint upon the grounds that the complaint did not state facts sufficient to constitute a cause of action against defendant. The trial court sustained the demurrer. The plaintiff elected to stand upon his demurrer and judgment was entered accordingly dismissing the action with prejudice and with costs. Thereupon the plaintiff took an appeal to the Supreme Court of North Dakota and that court affirmed the judgment of the lower court. Thereupon plaintiff in error sued out this writ of error.

STATEMENT OF FACTS.

That statement of facts set forth by plaintiff in error are correct as far as they go, but, in order that this Court may have the entire situation before it, the following facts should be added:

2 Defendant in error was at all times a resident of North Dakota, and personal service of process in the proceedings had in Minnesota was never made upon him within the State of Minnesota, or elsewhere. (folio 75).

The provisions of the Constitution and Statutes of Minnesota which are involved in this case and upon which plaintiff in error must rely for a recovery are as follows:

CONSTITUTIONAL PROVISION.

(Section 3 of Article 10, Minnesota Constitution.)

"Each stockholder in any corporation, except those organized for the purpose of carrying on any kind of manufacturing or mechanical business, shall be liable to the amount of stock held or owned by him."

STATUTORY PROVISIONS.

(Chapter 272, General Laws of Minnesota, 1899.)

The plaintiff in error sets forth in his brief (page 6) several of the sections of this Act. We desire to add the provisions of Section One of the Act which reads as follows:

"SECTION 1. Whenever any corporation created or existing by or under the laws of the State of Minnesota, whose stockholders or any of them are liable to it or to its
3 creditors, or for the benefit of its creditors, upon or on account of any liability for or upon or growing out of

or in respect to the stock or shares at any time held or owned by such stockholders, respectively, whether under or by virtue of the constitution and laws of said State of Minnesota, or any statute of said state, or otherwise, has heretofore made or shall hereafter make an assignment for the benefit of its creditors under the insolvency laws of this state; or whenever a receiver for any such corporation has heretofore been or shall hereafter be appointed by any district court of this state, whether under or pursuant to any of the provisions of chapter seventy-six (76) of the General Statutes of eighteen hundred and ninety-four (1894) of Minnesota and the acts amendatory thereof or under or pursuant to any other statute of this state or under the general equity powers and practice of such court; the district court appointing such receiver or having jurisdiction of the matter of said assignment may proceed as in this act provided."

ARGUMENT.

The sole question involved upon this writ of error is whether or not, under the Full Faith and Credit Clause of the Federal Constitution, the order of assessment made by the Minnesota District Court is conclusively binding upon the plaintiff in error upon the question of whether or not the American Biscuit Company was a corporation whose stockholders were subject to the superadded liability imposed by the above provisions of the Minnesota Constitution.

The plaintiff in error contends that said order of assessment is conclusive upon that question.

The defendant in error contends that the question of whether or not this corporation is of the class in which superadded liability is imposed upon its stockholders goes to the very jurisdiction of the Minnesota District Court to proceed at all under said Chapter 272 laws of 1899 and to make the order of assessment which was made, and that, being a question of jurisdiction, can be raised in the suit at bar, brot to enforce said order of assessment.

MOTION TO DISMISS.

We first contend that this writ of error should be dismissed for the reason that it does not appear that a Federal question is presented or involved and, therefore, this Court has no jurisdiction.

It is at once apparent that the contention of plaintiff in error is based upon the fundamental premise that the provisions of the Minnesota Statutes in question when properly construed and as construed by the courts of that state, give to the order of assessment the conclusive effect he claims for it. The order of assessment would have no force or effect apart from the statutory provisions authorizing the court to make such order. The effect of such order of assessment depends directly and entirely upon the construction given to such statutory provisions. There is, there-

fore, directly involved the construction of statues of one state by the courts of another state, and this was the question which was presented to the Supreme Court of North Dakota for decision.

The fact that the question involved arose upon a demurrer to the complaint does not at all affect the matter. The complaint in paragraph 6 (folio 63) sets forth in full the powers given to the American Biscuit Company by its Articles of Incorporation. Under the provisions of the laws of North Dakota, the District Court of Cass County, North Dakota, in connection with the demurrer to the complaint and the Supreme Court of North Dakota on appeal, were required to take, and did take, judicial notice of the Constitutional and statutory provisions of Minnesota here involved. Subds. 63 and 64 of Sec. 7938 C. L. 1913 of North Dakota.

Therefore, the question of the construction of the Minnesota Constitution and statutes and the effect of the order of assessment based thereon, was as fully presented for determination as tho there had been a trial and the Articles of Incorporation, Constitution and Statutes had been introduced in evidence. The above cited statutes of North Dakota make the Constitution and Statutes of Minnesota as much a part of the complaint as tho they had been set forth at length in the complaint. The decision of the
6 Supreme Court of North Dakota (tr. page 7) shows that that Court followed the statute and took judicial notice of such matters. The Supreme Court of North Dakota was not concluded as to the proper construction to be placed upon these statutory and constitutional provisions of Minnesota and the decision of its Courts construing them, by the fact that the question arose upon demurrer or by the fact that the complaint may contain allegations in the form of an averment of fact as to the meaning of such laws and decisions.

Finney vs. Guy, 189 U. S. 336.

In support of our Motion to Dismiss we contend that plaintiff in error failed to plead the full faith and credit clause, and wholly failed to plead or prove any facts which would deprive the Supreme Court of North Dakota of its right and duty to decide for itself the proper construction to be placed upon the laws of Minnesota and the order of assessment based thereon.

The rule with respect to when the full faith and credit clause can be said to be properly raised as a question arising under the Constitution of the United States, was laid down by this Court in the case of Louisville & N. R. Co. vs. Melton, 218 U. S. 36. The Court says:

> "The general rule is that, in the absence of a statute to the contrary, if a settled construction by the court of last resort of a state enacting a statute is relied upon to control the judgment of the court of another state in interpreting the statute, such settled construction must be pleaded and proved. Eastern Bldg. & L. Assn. vs. Ebaugh, 185 U. S. 114 and cases cited. As, however, it is not asserted that there was a statute of Kentucky controlling the courts of that state in construing the statute of other states, and as there was no pleading or proof as to the existence of any such settled construction, it follows that

there is nothing presented, which can be held to have deprived the court below of its power to exercise its independent judgment in interpreting the statute. Our duty, of course, is confined to determining whether error was committed by the court below as to the Federal questions involved; and as it is impossible to predicate error as to matters not pleaded or proved in the court below, which were essential to be pleaded and proved, it follows that the contention concerning the denial of the protection of the full faith and credit clause furnishes no ground for reversal. Johnson vs. Ins. Co., 187 U. S. 491."

An examination of the amended complaint which is found at pp. 1 to 5 of transcript will show that no statute of North Dakota controlling the courts of that state in construing statutes of other states, is pleaded; nor is there pleaded any decisions of Minnesota showing a settled contruction by the Supreme Court of that state which would control the decision of the Supreme Court of North Dakota as to the construction of the statute in question or the effect to be given the order of assessment.

8 We therefore, respectfully contend that the record does not disclose that a Federal question arises under the full faith and credit clause and that this writ of error should be dismissed.

DISCUSSION OF THE MERITS.

But assuming that the record does present a Federal question, nevertheless we contend that the decision should be affirmed.

We contend:

(1) That the American Biscuit Company was a manufacturing business within the provisions of Sec. 3, Art. 10 of the Minnesota Constitution and hence that there was no superadded liability upon its stockholders to be enforced.

(2) That the question of the character of the American Biscuit Company and whether there was, in fact, any superadded liability imposed upon its stockholders goes to the jurisdiction of the Minnesota District Court to enter any order of assessment at all, and hence can be raised in this suit to defeat the action.

PROPOSITION 1.

The Supreme Court of North Dakota, in its decision filed in this cause, held that the American Biscuit Company was a "manufacturing business" within the provisions of the Minnesota Constitution, and that, therefore, there was no superadded liability

9 upon its stockholders.

It is our contention that the decision of the North Dakota Supreme Court upon this question is conclusive upon this Court. This is a question of local law which is not reviewable by this court.

Stone vs. Railway Co., 206 U. S. 267.
New Orleans, etc. vs. Louisiana, 180 U. S. 320.
Greatwestern, etc. vs. Purdy, 162 U. S. 329.

We further contend that such decision was in fact correct.

It is a very significant fact that neither in the District Court of Cass County, North Dakota; nor in the Supreme Court of that state did plaintiff in error contend, nor does he contend in his brief filed in this Court, that there was in fact any superadded liability. He has merely contented himself with the contention that the order of assessment was conclusive upon that question.

The Supreme Court of Minnesota in the case of Senour vs. Church (Minn.) 84 N. W. 109 held that "in proceedings to enforce the personal liability of stockholders for the debts of the corporation, the articles of association are the sole criterion as to the purposes for which the corporation was formed," and also held in the same case that "the intention of the incorporators must control in construing this language (i. e. the articles of association). The same rule must be applied as is applied in the construction and interpretation of contracts and other writings."

The powers given the American Biscuit Company by its articles of association are set forth fully in paragraph 6 of the complaint (transcript, page 2). A reference to these articles will show that they empower the corporation:

(a) To manufacture and sell certain enumerated manufactured products and supplies:

(b) To manufacture and sell "the machinery, fixtures, equipment, and supplies necessary for the manufacturing and dealing in the same" (i. e. the aforesaid manufactured products):

(c) To sell, buy, own, hold, lease and convey such real estate and personal property as may, in the judgment of its directors, be necessary, proper and profitable in carrying on its business:

(d) To appoint and remove agencies for the conducting of any branches thereof (i. e. of the aforesaid manufacturing business):

(e) To maintain and operate stores and depots for the sale and disposal of its products and the purchase of its supplies:

(f) And, in general, to do and perform all matters and things necessary and proper in the successful conducting of its business.

We submit that these Articles in clauses 1 and 2 provide for the carrying on of a manufacturing business and a sale of the products so manufactured and that the other clauses make provision for the doing of other things clearly incidental and necessary to the successful prosecution of such manufacturing business, namely the manufacture of the enumerated products and supplies and of the machinery, etc., necessary for manufacturing and dealing in the same. All the other provisions are clearly incidental to such main business.

In the following cases the corporation was held to be a "manufacturing business" and that there was no superadded liability.

In Senour vs. Church (Minn.) 84 N. W. 109 the Articles read as follows:

"The general nature of the business of said corporation shall be to manufacture painters' material and supplies, the owning, holding and using of letters patent pertaining to the manufacture of such articles, and doing anything

that is properly incident to or necessarily connected with such manufacturing business."

In Cuyler vs. Power Co., (Minn.) 76 N. W. 948 the articles read as follows:

"The general nature of its business shall be the acquiring and holding, either by purchase or lease, of real estate on water power, and the purchasing, hiring, building, improving, or construction of canals, locks, ponds, or water courses within Ottertail county, Minnesota, with the water power appurtenant thereto; the building, erecting, repairing, purchasing, leasing, operating and maintaining of all necessary and convenient bridges, free of toll dams, flumes, water gates, pipe conduits, aqua ditches, well reservoirs, buildings, fixtures, cables, machinery, and water wheels, or other works necessary, proper or convenient for the purpose of producing and creating water, steam, and other motive power, and all transmission and application of the same for manufacturing and lawful business and the acquiring, in any lawful manner, of any or all flowage and riparian rights that may be necessary or convenient in the prosecution of its business, and the disposing of any or all of its property, power, and rights, either by sale or lease."

In Bank vs. Turner Co. (Minn.) 74 N. W. 160 the articles read as follows:

"The name of the corporation shall be Frisk-Turner Company, and the principal place of transacting its business shall be at Minneapolis, in the State of Minnesota; and its business shall be the manufacture of clothing of every description, and the sale of clothing so manufactured, and the transaction of all other business necessary and incidental to such manufacture and sale of clothing."

In Matting Co. vs. Brewing Co. (Minn.) 67 N. W. 662 the articles read as follows:

"The general nature of the business of this corporation shall be the manufacture or brewing of lager beer and other malt liquors, and to sell and dispose of the same, together with such other business as may be incidental thereto."

In Vencedor Co. vs. Power Co. (Minn.) 145 N. W. 611 the articles read as follows:

"The generation of electricity by means of water power and the distribution of the same for light, heat and power purposes all the foregoing to be done for public use for reasonable compensation; for such purposes the corporation may acquire by purchase, lease or condemnation ********all necessary dams, reservoirs, canals, pipe lines, power houses ******** necessary or convenient for carrying on the business of the corporation as above defined."

We submit that the American Biscuit Company was clearly a "manufacturing business" and that there was, in fact, no superadded liability.

PROPOSITION 2.

Is the defendant in error concluded by the order of assessment made by the Minnesota District Court from showing that, in fact, there was never any superadded liability?

We contend that since there was, in fact, no superadded liability, the Minnesota District Court never had any jurisdiction to make any order of assessment and that this question goes squarely to the jurisdiction of the Minnesota Court and can be raised in this action.

This Court in the early case of Thompson vs. Whitman, 18 Wall 457, 21 L. ed. 897 held that:

> "Neither the constitutional provision that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state or the act of Congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the Court by which a judgment offered in evidence was rendered.
>
> The record of a judgment entered in another state may be contradicted as to the facts necessary to give the Court jurisdiction and if it be shown that such facts did not exist, the record will be nullity, notwithstanding it may recite that they did exist. Want of jurisdiction may be shown, either as to the subject matter or the person, or in proceedings in rem as to the thing."

See also

Andrews vs. Andrews, 188 U. S. 14;
Bank vs. Wiley, 195 U. S. 257;
Ward vs. Joslin, 186 U. S. 142.

That this question goes to the jurisdiction of the Minnesota Court to make any assessment at all is plain.

The order of assessment which the Minnesota Court entered was made under and pursuant to the provisions of said Chapter 272, Laws 1899. By the express terms of Section 1 of said Chapter (quoted supra) the District Court can only proceed under the provisions of said Act when the corporation is one whose stockholders have a liability. And this would be true even in the absence of the express provision of Section 1 for the plain reason that the object of said Chapter 272 is to enforce stockholders liability. Concededly in the case at bar the only liability sought to be enforced is the alleged superadded liability of defendant. Since the American Biscuit Company is a manufacturing business, no superadded liability existed; the defendant and other stockholders were not liable to assessment because there was no liability to assess; there was no subject matter in existence upon which the jurisdiction of the Minnesota Court could operate; and therefore the order of assessment of that Court was rendered wholly without jurisdiction of any subject matter and was and is null and void.

Furthermore, Chapter 272 laws 1899 does not give the order of assessment the conclusive effect claimed for it by plaintiff in error where the stockholder is not personally served within the state

in the action. The order of assessment is only conclusive upon all stockholders, "so far as it decides the amount of assets and liabilities of the corporation before the Court, and is conclusive as to the necessity of making an assessment to the extent and in the manner ordered."

Straw vs. Shoe Co. (Minn.) 83 N. W. 36;
Bernheimimer vs. Converse, 206 U. S. 518.

It is not conclusive against the right of a stockholder when sued for the assessment, to show that he was not a stockholder, or that he was not the holder of so large an amount of stock as was alleged, or that he had a claim against the corporation which, in law or equity, he might be enabled to set off as against a 16 claim for assessments, or from making any other defense personal to himself.

Straw Co. vs. Shoe Co., Supra;
Bernheimer vs. Converse, Supra;
Gilson vs. Appleby (N. J.) 81 Atl. 925;
Shipman vs. Treadwell (N. Y.) 102 N. E. 634.

A fortori, it ought not to be conclusive against the right of the stockholder when sued for the assessment to show that there was in fact no superadded liability upon which to base any assessment at all.

4 Thompson on Corp. (2nd Ed.) Sec. 4972.
Swing vs. Humbird (Minn.) 101 N. W. 938.

In this case the Court says:

1. The plaintiff contends, in effect, that the ex parte decree in question is conclusive upon the defendants upon the question of their liability to assessment for the losses of the company, and that they are barred from urging the defense pleaded in this case. The question of the conclusiveness of an assessment upon stockholders and members of a corporation for the payment of its liabilities made by a court having jurisdiction to wind up its affairs is too well settled in this state to justify any extended discussion of it. Where a court has such jurisdiction of a corporation, its order or decree making an assess- 17 ment upon its stockholders or members without personal notice to them is conclusive as to all matters relating to the necessity for making the assessment, and the amount thereof. *"But it does not conclude any stock holder or member as to the question whether his relation to the corporation was such as to subject him to liability for an assessment, or as to any other defense personal to himself."*

Swing vs. Red River Lumber Co. (Minn.) 117 N. W. 442.

In this case the Court said.

"The last contention of the plaintiff to be considered is to the effect that the decree of the Supreme Court of Ohio making the assessment is conclusive upon the defendant upon the question of its liability to be assessed for the losses of the company, and that the trial court in this case, by refusing to give such conclusive effect to the decree, refused to give full faith and credit to the judi-

l proceedings of the state of Ohio, as required by
tion 1, art. 14, of the federal constitution. The decree
s ex parte as respects the defendant, it having been
ade without notice to the defendant. The decree, then,
e court having jurisdiction of the corporation, was con-
usive as to all matters relating to the necessity for and
e amount of the assessment; *but it is not conclusive as to*
e question whether the contract relations of an alleged
ember of the company were such as to subject him to lia-
bility for the assessment. It did not, nor could it, deprive
member of the company of any defense going to show
hat he was not liable to be assessed for the losses of the
ompany."

See also Great Western Tel. Co. vs. Purdy, 162 U. S. 329-40
L. ed. 986.

e argument which appellant makes and the authorities which
tes are all beside the real question in the case. We concede
Chapter 272 is constitutional. We concede that, given a
oration in which there is superadded liability, the jurisdiction
he corporation gives jurisdiction of the stockholders to the
nt of making the order of assessment conclusive as to the
ssity for and the amount of the assessment, even though no
ice of any kind was made on non-resident stockholders. But
must first exist a superadded liability upon which to base
assessment. The order of assessment has the conclusive effect
ded by Sec. 5 of the Act only when the Court has jurisdiction
rder an assessment. In all of the cases cited by appellant, the
oration in question was one in which there was a superadded
ility and hence the Court clearly had jurisdiction to enter
he order of assessment. Take for example the cases of Converse
Hamilton 224 U. S. 243 and Bernheimer vs. Converse 206 U. S.
These cases involved an assessment made by a Minnesota
rt upon stockholders of the Minnesota Thresher Manufacturing
pany. The objects for which that corporation was formed
re the purchase of the capital stock, evidence of indebtedness
l assets of the Northwestern Manufacturing and Car Company,
d for the further purpose of manufacturing and selling steam
gines, etc. This corporation was clearly not a manufacturing
siness within the constitutional provision and hence there was
superadded liability to enforce. The Supreme Court of Min-
sota so held as to this very corporation in State vs. Minnesota
. Co. (Minn.) 41 N. W. 1020. Furthermore in Converse vs.
amilton supra this Court expressly states that the corporation
s within the general terms of this provision (Sec. 3, Art. 10), not
e excepting clause."

The case of Neff vs. Lamm, 99 Minn. 115-108 N. W. 849 cited
plaintiff in error is not in point. This was a proceeding to
nforce an assessment against the estate of a deceased stock-
older. "The complaint alleged that the corporation was of such
character that its stockholders were subject to a superadded
liability. The answer contained a general denial, and set up other
defenses consistent only with the right to assess stockholders. It

did not set up as a separate defense that the corporation was not of such a class that its stock was subject to statutory assessment. The Court held that, inasmuch as the issue whether or not the corporation was of such a class that its stock was subject to assessment was not affirmatively asserted by the answer nor raised during the trial, the objection by the executor to the claim on the ground that the receiver failed in fact to introduce any evidence to prove the assessable character of the stock was without merit.

We respectfully submit that the judgment of the Supreme Court of North Dakota should be affirmed.

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EMERSON H. SMITH,
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MARIN, AS RECEIVER OF THE AMERICAN BISCUIT COMPANY OF CROOKSTON, *v.* AUGEDAHL.

ERROR TO THE DISTRICT COURT OF CASS COUNTY, STATE OF NORTH DAKOTA.

No. 227. Submitted March 18, 1918.—Decided May 20, 1918.

Refusal of a state court to respect a sister state judgment upon the ground that the court rendering it exceeded its jurisdiction under its own constitution and laws, presents a federal question based on the full faith and credit clause and the supplementary legislation of Congress.

The Minnesota constitution, Art. 10, § 3, in providing for stockholders' liability, excepts corporations organized for carrying on manufacturing business. *Held:*

(1) That the exception goes not to the jurisdiction but only to the merits in proceedings to sequester the assets of a local corporation and assess stockholders to pay its debts, under Rev. Laws, 1905, §§ 3173, 3184–3187; and that an order of assessment, made in such proceedings by the proper Minnesota court, of general jurisdiction, which in other respects has acquired jurisdiction over the corporation, and through it over the shareholders, necessarily involves a determination that the corporation is not of the excepted class, and in that respect is in Minnesota conclusive against collateral attack by a shareholder, whether or not he was personally a party to the proceedings.

(2) That like force must be given such order in an action brought by the receiver, appointed in such proceedings, to enforce the assessment against a shareholder in the courts of another State, and that a refusal of these courts to be bound by it, upon the ground that the corporation was of the class excepted by the Minnesota constitution, and erroneously treating this exception as jurisdictional, fails to accord the due faith and credit to which the order is entitled under the Federal Constitution and laws.

32 N. Dak. 536, reversed.

THE case is stated in the opinion.

Mr. Edward Engerud and *Mr. A. A. Miller* for plaintiff in error.

Mr. Emerson H. Smith, *Mr. A. W. Fowler* and *Mr. L. L. Twichell* for defendant in error:

The decision of the court below, based purely on the construction of the constitution and statutes of Minnesota, in the absence of any settled construction by the courts of that State duly pleaded, raises no federal question. *Louisville & Nashville R. R. Co.* v. *Melton*, 218 U. S. 36.

In holding that the company was in the manufacturing business, in the sense of the Minnesota constitution, the court below but decided a question of local law, not reviewable here (*Stone* v. *Southern Illinois Bridge Co.*, 206 U. S. 267; *New Orleans Debenture Redemption Co.* v. *Louisiana*, 180 U. S. 320; *Great Western Telegraph Co.* v. *Purdy*, 162 U. S. 329), and decided it correctly. [Citing Minnesota cases.]

The full faith and credit clause and supplementary act of Congress do not bar inquiry into the jurisdiction behind the Minnesota judgment. *Thompson* v. *Whitman*, 18 Wall. 457; *Andrews* v. *Andrews*, 188 U. S. 14; *National Exchange Bank* v. *Wiley*, 195 U. S. 257; *Ward* v. *Joslin*, 186 U. S. 142.

By the express terms of the Minnesota law the district court can only proceed when the corporation is one whose stockholders have a liability. And this would be true even in the absence of the express provision, for the reason that the object is to enforce stockholders' liability. Concededly in the case at bar the only liability sought to be enforced is the alleged superadded liability of defendant. Since the Biscuit Company's is a manufacturing business, no superadded liability existed; the defendant and other stockholders were not liable to assessment because there was no liability to assess; there was no subject-matter in

existence upon which the jurisdiction of the Minnesota court could operate; and therefore the order of assessment was rendered wholly without jurisdiction of any subject-matter and is null and void.

We concede that, given a corporation in which there is superadded liability, the jurisdiction of the corporation gives jurisdiction of the stockholders to the extent of making the order of assessment conclusive as to the necessity for and the amount of the assessment, even though no service of any kind was made on nonresident stockholders. But there must first exist a superadded liability upon which to base the assessment. The order of assessment has the conclusive effect provided by the act only when the court has jurisdiction to order an assessment. In all of the cases cited by plaintiff in error, the corporation in question was one in which there was a superadded liability and hence the court clearly had jurisdiction to enter the order of assessment.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was an action at law in North Dakota by a receiver of an insolvent Minnesota corporation to enforce against one of its stockholders an order of a Minnesota court laying an assessment on the stockholders generally. The defendant prevailed because the North Dakota court was of opinion that the order laying the assessment was made in the absence of such jurisdiction as was essential to bind him, 32 N. Dak. 536; and the question for decision here is whether that court gave to the laws and proceedings in Minnesota the full faith and credit to which they are entitled under the Constitution and laws of the United States. See *Great Western Telegraph Co.* v. *Purdy*, 162 U. S. 329; *Tilt* v. *Kelsey*, 207 U. S. 43, 51.

Under the law of Minnesota, where an execution on a

judgment against a corporation of that State is returned unsatisfied, the court, in a suit by the judgment creditor, may sequestrate the property of the corporation, appoint a receiver of the same, cause the property to be sold and apply the proceeds to the payment of the receivership expenses and the corporate debts. And where in such a suit the receiver presents a petition asserting that "any constitutional, statutory or other liability of stockholders" exists, and that resort thereto is necessary, the court must appoint a time for a hearing on the petition and cause such notice thereof as it deems proper to be given by publication or otherwise. If from the evidence presented at the hearing, including such as may be produced by any creditor or stockholder appearing in person or by attorney, it appears that there is a liability of stockholders and that the available assets are not sufficient to pay the expenses and debts, the court is required to make an order ratably assessing the stockholders on account of such liability and to direct that the assessment be paid to the receiver. If payment be not made, the duty is laid on the receiver of enforcing the same by actions against the defaulting stockholders, "whether resident or non-resident, and wherever found." The court's order is expressly made "conclusive as to all matters relating to the amount, propriety, and necessity of the assessment." Rev. Laws, 1905, §§ 3173, 3184–3187.

According to a settled line of local decisions the proceeding on the receiver's petition for an assessment on the stockholders is not an independent suit, but simply a step in the original sequestration suit, *Ueland* v. *Hougan*, 70 Minnesota, 349; and the conclusive effect of the court's order is not dependent on the personal presence of the stockholders, because they are so far in privity with the corporation as to be represented by it, and a judgment against it is in effect a judgment against them. *Hanson* v. *Davison*, 73 Minnesota, 454, 462; *Town of Hinckley* v.

Kettle River R. R. Co., 80 Minnesota, 32, 39. But while the order is conclusive "as to all matters relating to the amount, propriety, and necessity of the assessment"—*matters which concern all stockholders alike*—, it leaves open the questions whether a particular person is a stockholder or holds the number of shares attributed to him, whether he has discharged his liability or has a claim which may be set off against the assessment, and whether he has any other defense which is "*personal to himself.*" *Straw & Ellsworth Co.* v. *Kilbourne Co.*, 80 Minnesota, 125, 136.

As so applied, the Minnesota law has been sustained by this court against various claims that as to stockholders it infringes the due process clause of the Fourteenth Amendment; and we have also recognized and enforced the duty of courts of other States, under the due faith and credit clause of the Constitution and the legislation of Congress on that subject, to give effect to orders of Minnesota courts making assessments under that law, although the stockholders were not personally made parties to the suits wherein the orders were made. *Bernheimer* v. *Converse*, 206 U. S. 516; *Converse* v. *Hamilton*, 224 U. S. 243; *Selig* v. *Hamilton*, 234 U. S. 652. And see *Royal Arcanum* v. *Green*, 237 U. S. 531, 543–545.

The order with which we here are concerned was made by a Minnesota court in a sequestration suit against a Minnesota corporation. Besides being a court of general jurisdiction, both at law and in equity, the court making the order had full jurisdiction of that suit. The suit was begun by a judgment creditor after an execution on his judgment was returned unsatisfied. The defendant corporation had its principal place of business in the county where the suit was begun, and was brought into the suit by due service of process. Thus much is not questioned. Nor is it questioned that a receiver was appointed, or that by a petition in the suit he sought an

assessment on the stockholders, or that public notice of the hearing on the petition was given as the court directed, or that there was a hearing as contemplated. But it is insisted that the court was without jurisdiction to make the assessment and that in consequence the order is open to collateral attack. In support of this contention it is said that in making the assessment the court evidently proceeded on the mistaken assumption that the corporation was one on whose stockholders a liability was imposed by § 3 of article 10 of the state constitution,[1] whereas in truth the corporation was one of a class whose stockholders were excepted from the operation of that provision. But is this anything other than saying that the court erred in ruling on a matter of substantive law regularly presented to it for decision in a pending suit? The constitutional provision does no more than to declare a general rule of liability and to except therefrom stockholders of a certain class of corporations. It does not purport to deal with the jurisdiction of courts—their power to hear and determine—, but only to prescribe in a general way the relative rights of stockholders and creditors. It therefore must be taken as going to the merits rather than to the jurisdiction. The Minnesota courts evidently so regard it; and they also treat the question whether a particular corporation belongs to one class or another as a matter the decision of which in a suit against the corporation is binding on the stockholders in subsequent litigation with the latter. *Merchants National Bank* v. *Minnesota Thresher Manufacturing Co.*, 90 Minnesota, 144, 149.

Four Minnesota cases are cited as making against these views, but we do not so understand them. In *Dwinnell* v. *Kramer*, 87 Minnesota, 392, a policyholder in an in-

[1] "Each stockholder in any corporation, excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business, shall be liable to the amount of stock held or owned by him."

solvent mutual fire insurance company, against whom a general assessment on the policyholders was sought to be enforced, successfully defended on the ground that his policy did not conform to the mutual plan, but was an "ordinary contract of insurance" issued on receipt of a cash premium. The defense plainly was personal to him. *Swing* v. *Humbird*, 94 Minnesota, 1, arose under an Ohio law and not the law of Minnesota. An assessment made in Ohio on the policyholders of an insolvent fire insurance company was sought to be enforced in Minnesota, and the defendant prevailed because his policy had been fully paid for and had terminated prior to the assessment. That also was a personal defense. In *Swing* v. *Red River Lumber Co.*, 105 Minnesota, 336, an attempt was made to enforce a similar Ohio assessment, but it failed for the reason, among others, that when the defendant's policy was issued the insurance company was doing business in Minnesota in violation of the laws of that State,—a matter which was personal to him and to other Minnesota policyholders if there were such. In *Finch, Van Slyck & McConville* v. *Vanasek*, 132 Minnesota, 9, there was a direct appeal from an order levying an assessment on stockholders in a sequestration suit. The character of the corporation was not in controversy, and the "only controverted question before the [trial] court was the amount to be levied." There also was a question in the appellate court as to whether the trial should have been to a jury. With this in mind, it seems plain that what was said can have no particular bearing here.

Had the Minnesota court in this instance held that the corporation was in the excepted class and then denied the receiver's petition, is it not certain that the order, if neither vacated nor reversed, would have settled conclusively the non-existence of the asserted liability? And if in a subsequent suit the receiver or the creditors represented by him had again asserted such a liability on the part of

the stockholders, is there any doubt that the latter could have relied safely on the order as a prior adjudication in their favor? The answers seem obvious. Charged with the duty, as the court was, of ascertaining whether there was any liability to be enforced, it was its province to consider and decide every question which was an element in that problem, including the one of whether the corporation was in the excepted class. That question required solution and the power to solve it was lodged in the court. The court did solve it, for, as is said in *Neff* v. *Lamm*, 99 Minnesota, 115, 117, the order making the assessment is "necessarily based upon a determination that the corporation is of the class whose stock is assessable, and not of the excepted class." Whether the decision was right or wrong is not open to discussion here. If wrong it was subject to correction on proper application to the court which made it, or on appeal, but it was not void or open to collateral attack. *Deposit Bank* v. *Frankfort*, 191 U. S. 499, 510, 512; *Noble* v. *Union River Logging R. R. Co.*, 147 U. S. 165, 172–174; *Dowell* v. *Applegate*, 152 U. S. 327, 340; *In re First National Bank*, 152 Fed. Rep. 64, 68–70. Of course, it was the duty of the court to have due regard for the exception in the constitutional provision because of its bearing on the merits; and if proper effect was not given to it an error of law was committed, but nothing more. The true view of the subject is indicated in the following excerpts from our opinion in *Fauntleroy* v. *Lum*, 210 U. S. 230, 234, 237:

"No doubt it sometimes may be difficult to decide whether certain words in a statute are directed to jurisdiction or to merits, but the distinction between the two is plain. One goes to the power, the other only to the duty of the court. Under the common law it is the duty of a court of general jurisdiction not to enter a judgment upon a parol promise made without consideration; but it has power to do it, and, if it does, the judgment is unimpeacha-

ble, unless reversed. Yet a statute could be framed that would make the power, that is, the jurisdiction of the court dependent upon whether there was a consideration or not. Whether a given statute is intended simply to establish a rule of substantive law, and thus to define the duty of the court, or is meant to limit its power, is a question of construction and common sense. When it affects a court of general jurisdiction and deals with a matter upon which that court must pass, we naturally are slow to read ambiguous words, as meaning to leave the judgment open to dispute, or as intended to do more than to fix the rule by which the court should decide."

"A judgment is conclusive as to all the *media concludendi*, *United States* v. *California & Oregon Land Co.*, 192 U. S. 355; and it needs no authority to show that it cannot be impeached either in or out of the State by showing that it was based upon a mistake of law."

Whether the stockholder against whom the order is here sought to be enforced was personally a party to the suit in which it was made does not appear; nor is it material. Under the rule in Minnesota, as also the general rule, he was sufficiently represented by the corporation to be bound by the order in so far as it determined the character and insolvency of the corporation and other matters affecting the propriety of a general assessment such as was made. This court frequently has recognized and applied that rule. In *Hawkins* v. *Glenn*, 131 U. S. 319, an assessment ordered by a Virginia court having the corporation before it was sustained as against stockholders residing in another State and not personally brought into the suit, the ground of decision being that "a stockholder is so far an integral part of the corporation that, in the view of the law, he is privy to the proceedings touching the body of which he is a member." Of similar import are *Sanger* v. *Upton*, 91 U. S. 56; *Glenn* v. *Liggett*, 135 U. S. 533; *Great Western Telegraph Co.* v. *Purdy*, 162

U. S. 329, 336; *Hancock National Bank* v. *Farnum*, 176 U. S. 640; *Bernheimer* v. *Converse*, 206 U. S. 516, 532; *Royal Arcanum* v. *Green*, 237 U. S. 531, 544.

No doubt the order might be attacked collaterally by showing an absence of jurisdiction of person or subject-matter. The cases of *Thompson* v. *Whitman*, 18 Wall. 457, and *National Exchange Bank* v. *Wiley*, 195 U. S. 257, hold nothing more. Neither gives any warrant for saying that the order may be attacked collaterally by showing that error was committed in deciding the merits. One dealt with a judgment by a court having no jurisdiction whatever over the subject-matter, and the other dealt with a personal judgment rendered without service of process or personal appearance, but confessed under a warrant of attorney which did not cover it—in other words, a judgment rendered without jurisdiction of the person through a representative or otherwise. Both are inapposite here. By the law of its organization the Minnesota court was empowered to take cognizance of, hear and determine, the suit to sequestrate and the receiver's petition for an assessment. Thus it had jurisdiction of the subject-matter. *Cooper* v. *Reynolds*, 10 Wall. 308, 316. The corporation was before it in virtue of process duly served, and the stockholders, as has been said, were represented by the corporation. Thus there was jurisdiction of the person.

Under these circumstances, the order is entitled, under the Constitution and laws of the United States, to the same faith and credit in the courts of North Dakota as by law or usage are given to such an order in the courts of Minnesota. *Hancock National Bank* v. *Farnum*, 176 U. S. 640; *Converse* v. *Hamilton*, 224 U. S. 243. In Minnesota, as before said, it is conclusive of all matters relating to the propriety of the assessment, including the questions of the character and insolvency of the corporation, and therefore it should have been held similarly

conclusive in North Dakota. The court of that State declined to regard it as determining the character of the corporation, and so failed to give it the faith and credit to which it is entitled.

Judgment reversed.

MR. JUSTICE CLARKE, dissenting.

The importance of the question involved in this case leads me to state somewhat fully my reasons for dissenting from the decision of the court.

The plaintiff in error, as receiver of the American Biscuit Company of Crookston, an insolvent corporation, organised under the laws of the State of Minnesota, instituted suit in a district court of North Dakota against the defendant in error, a stockholder in the company, to recover upon an order, treated in the record as a judgment, entered by an inferior, a district court of the State of Minnesota, which is described in the amended complaint as follows:

"The said court . . . made an order in said proceedings ordering and assessing against each and every share of the capital stock of said American Biscuit Company of Crookston the sum of one hundred dollars ($100) and against the persons and parties liable as such stockholders . . . and further ordering that each and every party or person liable as such stockholder pay to this plaintiff as Receiver of said insolvent corporation the sum of one hundred dollars ($100) for each and every share of stock on which he should be liable," etc.

It is further alleged that the defendant is the owner of one share of stock of the said company of the par value of $100 and that he has not paid to the court the assessment made.

The complaint sets out in detail the statutes under which the Minnesota court proceeded and alleges that the Biscuit Company

"By its Articles of Incorporation . . . was empowered to manufacture and sell biscuits, crackers, candies, confections, cereals, and other kindred products, or supplies (necessary) or component parts thereof, and ["to purchase or own," probably omitted] the machinery, fixtures, equipment and supplies necessary for the manufacturing and dealing in the same . . . and to maintain and operate stores and depots for the sale and disposal of its products and the purchase of its supplies, and in general to do and perform all matters and things necessary and proper in the successful conducting of its said business."

The District Court of North Dakota sustained a demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and its judgment was affirmed by the Supreme Court of the State.

The constitution of Minnesota in effect at the time of the transactions involved in the case contains the following provision:

Article 10, § 3. "Each stockholder in any corporation, excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business, shall be liable to the amount of stock held or owned by him."

It is admitted that this is the only warrant for the Minnesota order, which was for the amount of the personal or double liability of stockholders.

The theory on which the North Dakota courts proceeded was that the complaint showed that the Biscuit Company was a manufacturing corporation such that no double liability could attach to its stockholders, and that therefore the Minnesota court did not have jurisdiction, under the constitution and laws of that State, to enter an order which precluded the defendant from showing that he was not, and could not be, liable to a valid double liability assessment.

The distinction between provisions of law which are

jurisdictional and those which are not, has not been, perhaps cannot be, made the subject of hard and fast definition. A much quoted statement is that the distinction, while difficult of application, is between "A rule of law for the guidance of the court and a limit set to its power." *Interstate Commerce Commission* v. *Northern Pacific Ry. Co.*, 216 U. S. 538, 544; *Fauntleroy* v. *Lum*, 210 U. S. 230, 235.

In the opinion of the court it is said that the district court which entered the order sued on is a court of general jurisdiction. As a general statement this may be accepted, but when that court entered the order we are here considering it was not acting as a court of general jurisdiction, but,—as we shall see, from the decisions of the Supreme Court of Minnesota,—as a statutory court of narrowly limited powers, authorized to enter orders "conclusive" in specifically defined respects. As a court of general jurisdiction, and independent of the statute under which the court was acting, its receiver could not have maintained this action in North Dakota. *Hale* v. *Allinson*, 188 U. S. 56.

In the case at bar we are dealing with a constitutional provision, obviously intended for the encouragement of manufactures in the State of Minnesota, which places it beyond the power of the legislature to attach double liability to holders of stock in any manufacturing corporation organized under the laws of that State.

Shall it be said that this, clearly a limitation on the power of the legislature, is not also a limitation on the power of the Minnesota courts? That it is a jurisdictional limitation upon the legislature but was only a rule for the guidance of the court, the jurisdiction of which, when entering the order involved, was determined by the act of the legislature? It is not merely a rule to guide courts in determining whether stockholders in manufacturing corportations are subject to double liability, for it prohibits both the legislature and the courts from imposing such

liability upon stockholders in such corporations under any circumstances and is therefore a limitation upon the power of courts as certainly as it is a limitation on legislative power.

The validity, in a proper case, of such an order as was entered by the Minnesota court, and the right of such a receiver to maintain a suit upon it in a foreign State to collect from stockholders resident therein, have both been sustained by this court (*Bernheimer* v. *Converse*, 206 U. S. 516; *Converse* v. *Hamilton*, 224 U. S. 243). But in each of these cases it was expressly found that the insolvent company was within the general terms of § 3, Art. 10, of the Minnesota constitution, and that therefore personal liability attached to its stockholders.

Notwithstanding this fact, the defendant in error contends that the Minnesota court was without jurisdiction to render the order sued upon, and argues in substance as follows:

(1) That the Minnesota court had authority to render such a "judgment" only as against stockholders in other than corporations organized for manufacturing or mechanical business.

This is not contested by the plaintiff in error in argument, but the answer to it, relied upon, is that the first question confronting the Minnesota court hearing the petition of creditors for the assessment was whether the Biscuit Company was a corporation whose stockholders were subject to double liability; that the order making the assessment could have been rendered only upon a holding that it was such a corporation; and that such an order, not appealed from, is conclusive as to this question, upon all stockholders.

(2) That the character of the corporation as pleaded shows it to have been a manufacturing company, that therefore no personal liability attached to its stockholders and that thereby the Minnesota court is shown to have

been without jurisdiction to render the "judgment" sued upon.

This contention also is not contested by the plaintiff in error, who contents himself, again, with relying upon the implication springing from the rendering of the Minnesota order.

It seems clear enough that a corporation "empowered to manufacture and sell biscuits, crackers, candies," etc., and to own and use "the machinery, fixtures, equipment and supplies necessary for the manufacturing and dealing in the same" must be classed as one "organized for the purpose of carrying on" a "manufacturing business."

But the Supreme Court of Minnesota has placed this conclusion beyond discussion.

In *Senour Mfg. Co.* v. *Church Paint & Mfg. Co.*, 81 Minnesota, 294, it is held:

"In proceedings to enforce the individual liability of stockholders of a corporation [for the debts of the corporation], the Articles of Incorporation are the sole criterion as to the purposes for which the corporation was formed." And corporations organized for purposes stated as follows have been held by that court to be manufacturing corporations such that they came within the constitutional exception, so that personal liability did not attach to holders of stock in them, viz., companies organized for: "The manufacture of painters' materials and supplies," *Senour Case, supra;* "For the manufacturing or brewing of lager beer, and selling and disposing of same," *Hastings Malting Co.* v. *Iron Range Brewing Co.*, 65 Minnesota, 28; "For the manufacture of cloth of every description and the sale of cloth so manufactured," *Nicollet National Bank* v. *Frisk-Turner Co.*, 71 Minnesota, 413; "To produce and create water, steam and other motive power for transmission and use as may be desirable for any legitimate purpose," *Cuyler* v. *City Power Co.*, 74 Minnesota, 22; "For the purpose of generating electricity for distribution

to the public," *Vencedor Investment Co.* v. *Highland Canal & Power Co.*, 125 Minnesota, 20.

The test prescribed by the Supreme Court of Minnesota is, Whether the entire business which the corporation is authorized to engage in is manufacturing and disposing of its products and such incidental business as may reasonably be necessary for the purposes of its organization. *Hastings Malting Co.* v. *Iron Range Brewing Co.*, 65 Minnesota, 28, 31. Again, and obviously, in *Nicollet National Bank* v. *Frisk-Turner Co.*, 71 Minnesota, 413, it was held that the buying of raw materials and the selling of manufactured products are within the scope of the incidental powers of a manufacturing corporation, and do not constitute doing business other than the manufacturing business authorized. Clearly the Biscuit Company meets the constitutional requirement thus interpreted.

The difference between the case at bar and the *Bernheimer* and *Converse Cases*, *supra*, is manifest and fundamental. These two cases were concerned with the affairs of the same corporation, and the Supreme Court of Minnesota held that on their face the articles of incorporation of the company provided for the purchase of the capital stock, evidences of indebtedness and assets of another corporation and also for a manufacturing purpose; that the former business was not incidental to the latter and that, therefore, the company not being organized exclusively for a manufacturing purpose, did not come within the constitutional exception and that the personal liability attached to the stockholders. With this conclusion this court expressed itself satisfied in both cases.

The question remains whether, in the proceeding in which the order relied upon was entered, the Minnesota court had jurisdiction to render and actually did render an order such that a stockholder when sued upon it, either in Minnesota or in another State, would not have open to him the defense that the insolvent corporation was of

such character that double liability did not attach to the owners of its stock.

That the court did not have such jurisdiction and did not enter such an order in this case seems to me clear for the reasons following, viz.:

In *Thompson* v. *Whitman*, 18 Wall. 457, a decision obviously "rendered on great consideration," prior decisions dealing with the full faith and credit clause of the Constitution were carefully reviewed, and it was there decided that when the question of jurisdiction is appropriately presented the record of a judgment rendered may, constitutionally, be assailed in a collateral proceeding to enforce it in another State, even as to facts therein stated to have been passed upon by the court. This decision has been repeatedly affirmed and followed, and in *National Exchange Bank* v. *Wiley*, 195 U. S. 257, it was accepted as authority sufficient for holding that a judgment by confession under warrant of attorney could be collaterally attacked in a foreign State by showing that the plaintiff in whose favor it was rendered in an Ohio court of general jurisdiction was not the owner of the note in suit at the time, and that the court entering it was, therefore, without jurisdiction, although the rendering of the judgment involved, or implied, the finding that the plaintiff was then the owner of the note.

These authorities will suffice to illustrate the scope of the established rule that a judgment sued on in a foreign State may be shown in defense to have been entered by the court rendering it without jurisdiction, regardless of the form which such judgment may take on.

With this rule in mind let us examine the character and scope of the "order" sued upon in this case.

The order was entered in a special statutory proceeding of a character such that the Supreme Court of Minnesota has declared that it is intended to be "*summary and without formal pleadings*, and not controlled by all the forms

usually incident to judicial procedure." 132 Minnesota, 9, 12; the hearing in such cases is upon "such notice as it [the court] deems proper, by publication or otherwise, to be given;" upon the hearing the court "shall receive and consider such evidence *by affidavit or otherwise* as may be presented by the receiver, or by any creditor, officer, or stockholder, appearing in person or by attorney," and the statute expressly provides that:

"Such order shall be conclusive as to all matters relating to the *amount, propriety, and necessity* of the assessment, against all parties therein adjudged liable upon, or on account of, any stock or shares of such corporation, whether appearing or being represented at the hearing or not, or having notice thereof or not." Rev. Laws, 1905, § 3186.

That the conclusive character of the order entered in such a proceeding has been strictly confined by the Minnesota Supreme Court to the respects in which the statute just quoted declares it shall be conclusive, leaving all other defenses open to the stockholder, is shown by the following decisions:

The act in force when the order now under discussion was entered was passed in 1899 [Laws 1899, c. 272], and in the following year the Supreme Court of Minnesota sustained its constitutionality in *Straw & Ellsworth Co.* v. *Kilbourne Co.*, 80 Minnesota, 125, a case cited with approval by this court in both the *Bernheimer* and *Converse Cases, supra.* It was there held as follows:

"Although the court inquires into the amount of the liabilities as well as to what will probably be realized out of the assets, *its sole determination is* that it is necessary and proper that an assessment of a given amount shall be levied against each share of stock. *That, and that only, is the ultimate issuable fact to be found by the court.*

"The plain purport of sections 3 and 5 is that after an

order of assessment has been duly made, and the receiver has sued an alleged stockholder to recover upon the assessment, the order cannot be attacked in that action upon the ground that the assessment was unnecessary or excessive, or upon the ground that the defendant was not actually a party to, or personally notified of, the hearing upon which the assessment was made. . . .

"But, as we have heretofore intimated, the stockholders are not concluded in all respects by the determination of the court, nor is that the fair meaning of chapter 272, § 5. A person sued as *a shareholder may show*, if he can, *that he is not a shareholder at all, or that he is not the holder of so large an amount of stock as is alleged*, or that he has discharged his liability, or that he has a claim against the corporation which he may, in law or equity, set off against the claim or judgment in assessment, *or he may make any other defense which is personal to himself.*"

Again, in its latest construction of the act, in 1916, in *Finch, Van Slyck & McConville* v. *Vanasek*, 132 Minnesota, 9, 12, the court uses this language:

"It was intended by the statute that the proceeding should be summary and without formal pleadings, and it is not controlled by all of the forms usually incident to judicial procedure. *The court* under the statute deals in the main with probabilities, and *is not authorized to determine any fact, other than that of insolvency and the amount of the assessment to be made*, which in any way precludes the stockholders in a subsequent action brought to enforce the assessment. *The assessment is but preliminary to such an action and therein the stockholders may present all matters that may be available to them in defense. Straw & Ellsworth Mnfg. Co.* v. *L. D. Kilbourne Boot & Shoe Co.," supra.*

Thus is the expression in the earlier case "He [the stockholder] may make any other defense which is personal to himself," interpreted in this later case as meaning

"All matters that may be available to them [the stockholders] in defense."

During the sixteen years between these two decisions that court had under consideration the scope of several such "orders" [following the language of the act, the court habitually refers to them as "orders" not "judgments"] and it has expressed its conclusions as follows:

In *Dwinnell* v. *Kramer*, 87 Minnesota, 392 (1902), in a suit upon an assessment order, made under the act we are considering, against the holder of a policy in a mutual insurance company, [There is no "difference, in principle, in respect to the question now under consideration, between an action to recover on premium notes, when insolvency of the company has made an assessment on members necessary, and an action to enforce a stockholder's liability, constitutional or statutory," 80 Minnesota, 134] the defense was made on demurrer that the policy issued to the defendants "shows upon its face that the defendants were not insured on the mutual plan, and that the extent of their liability by the terms of the policy was the amount of the premium named therein, which has been paid." This defense was entertained and held valid by the court against precisely such a "judgment" as this court now holds conclusive against a defense in principle precisely similar,—that under the contract relation of the defendant to the corporation he was not liable for any double liability assessment.

Again, in *Swing* v. *Humbird*, 94 Minnesota, 1 (1904), in an action on an assessment made by the Supreme Court of Ohio in a suit on a mutual insurance company policy, under a statute similar to that of Minnesota, the court holds in the syllabus, paragraph 1:

"Such assessment is not conclusive upon any policyholder as to the question whether his relation to the company was such as to subject him to liability for an assessment. The judgment making the assessment is, how-

ever, conclusive as to matters relating to the necessity for, and the amount of, the assessment."

In the opinion the court says:

"The plaintiff contends, in effect, that the ex parte decree in question is conclusive upon the defendants upon the question of their liability to assessment for the losses of the company, and that they are barred from urging the defense pleaded in this case. *The question of the conclusiveness of an assessment upon stockholders* and members of a corporation for the payment of its liabilities made by a court having jurisdiction to wind up its affairs *is too well settled in this State to justify any extended discussion of it.* Where the court has such jurisdiction of a corporation, its order or decree making an assessment upon its stockholders or members without personal notice to them is conclusive as to all matters relating to the necessity for making the assessment, and the amount thereof. *But it does not conclude any stockholder or member as to the question whether his relation to the corporation was such as to subject him to liability for an assessment,* or as to any other defense personal to himself," citing cases. . . . "The assessment in the case last cited (*Dwinnell* v. *Kramer*, *supra*) was made by one of the courts of our own state, yet effect was given to the claim of the defendant that by virtue of his policy contract he was not liable to assessment."

Here again the same character of defense urged in the instant case was entertained and sustained, viz: That, notwithstanding the order or judgment, the policies on which the assessment was entered were "of a class which imposed no liability upon the holders thereof beyond the amount of the cash deposit required." In the case at bar the character of the corporation is such that no double liability can constitutionally be imposed on any of its stockholders.

Again, in *Swing* v. *Red River Lumber Co.*, 105 Minne-

sota, 336 (1908), the court had under consideration an assessment upon the policyholders of a mutual insurance company, entered by the Ohio Supreme Court, under a statute similar to that of Minnesota, and the court said:

"The last contention of the plaintiff to be considered is to the effect that the decree of the supreme court of Ohio making the assessment is conclusive upon the defendant upon the question of its liability to be assessed for the losses of the company, and that the trial court in this case, by refusing to give such conclusive effect to the decree, refused to give full faith and credit to the judicial proceedings of the state of Ohio, as required by section 1, art. 4, of the federal constitution. The decree was ex parte as respects the defendant, it having been made without notice to the defendant. The decree, then, the court having jurisdiction of the corporation, was conclusive as to all matters relating to the necessity for and the amount of the assessment; *but it is not conclusive as to the question whether the contract relations of an alleged member to the company were such as to subject him to liability for the assessment.* It did not, nor could it, deprive a member of the company of any defense going to show that he was not liable to be assessed for the losses of the company. *Great Western Tel. Co.* v. *Purdy*, 162 U. S. 329; *Swing* v. *Western Lumber Co.*, 205 U. S. 275."

These cases, made complete by *Finch, Van Slyck & McConville* v. *Vanasek*, *supra*, decided in 1916, give us a line of decision, not only general in terms but specific in application, consistently maintained for sixteen years, which, it seems to me, makes it very clear that if the suit commenced in North Dakota, which we are considering, had been instituted in a Minnesota court it would have been open to the defendant stockholder to show, in defense, that his relations to the company were such as not to subject him to liability (94 and 105 Minnesota, *supra*) and that, therefore, the opinion of the court gives to the

"order" of an inferior court of Minnesota a faith and credit in North Dakota which it would not have had in the State of its origin, a result which I venture to think is unsound in principle, anomalous in our judicial history and likely to lead to most unfortunate results.

The opinion of the court concedes that, notwithstanding this "judgment," it was open to the defendant stockholder, in the North Dakota case, to show, if such were the fact, that he was not a stockholder at all; that he owned but half as many shares as was alleged; that he had paid the amount assessed against him in whole or in part, or that he had a set-off to apply on the amount of the assessment. But, nevertheless, the court concludes that he cannot be permitted to show, as was true, that he was not, and could never have been, indebted to the receiver on the liability relied upon,—and this, notwithstanding that the latest decision of the Supreme Court of Minnesota, construing the statute of its own State, holds, as quoted above, that in such a suit the stockholders "may present all matters that may be available to them in defense," and notwithstanding the fact that the earlier cases also held that such an order is not conclusive as to "whether the contract relations of an alleged member to the company were such as to subject him to liability for the assessment," (94 and 105 Minnesota, *supra*). When we add that the holding of this court in the *Bernheimer Case*, repeated in the *Converse Case*, *supra*, was that "It may be regarded as settled that upon acquiring stock the stockholder [in a Minnesota corporation] incurred an obligation arising from the constitutional provision, *contractual in its nature*," we are seemingly confronted with the conclusion that the decisions of a Supreme Court of a State, construing its own statutes, of the character such as we have here (*Flash* v. *Conn*, 109 U. S. 371, 378) are no longer of controlling influence on this court but may be ignored in its discretion.

Believing, as I do, that upon the discussion in this opinion and upon the authorities cited, the insolvent corporation involved was one within the exception of the Minnesota constitution and that, therefore, no double liability attached to the defendant in error; that under the Minnesota decisions cited this defense could have been successfully made against the order if it had been sued on in a Minnesota court; that the implied finding that the corporation was not within the exception is necessarily jurisdictional, and that therefore it was open to the stockholders to assail it when sued in North Dakota, as it would have been in Minnesota; and that facts sufficient appeared on the face of the complaint to show that in this case the defense was a valid one, I think the judgment of the Dakota courts should be affirmed and therefore dissent from the decision of the court.

MR. JUSTICE PITNEY and MR. JUSTICE BRANDEIS concur in this dissent.